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IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1160 – 65/1/1/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 October 2010

Before:

VIVIEN ROSE
(Chairman)

DR. ADAM SCOTT OBE TD
DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) IMPERIAL TOBACCO GROUP PLC
(2) IMPERIAL TOBACCO LIMITED — Appellants

- v -

OFFICE OF FAIR TRADING — Respondent

CO-OPERATIVE GROUP LIMITED — Appellant

- v -

OFFICE OF FAIR TRADING — Respondent

WM MORRISON SUPERMARKETS PLC — Appellant

- v -

OFFICE OF FAIR TRADING — Respondent

(1) SAFEWAY STORES LIMITED
(2) SAFEWAY LIMITED — Appellants

- v -

OFFICE OF FAIR TRADING — Respondent

(1) ASDA STORES LIMITED
(2) ASDA GROUP LIMITED
(3) WAL-MART STORES (UK) LIMITED
(4) BROADSTREET GREAT WILSON EUROPE LIMITED Appellants

- v -

OFFICE OF FAIR TRADING Respondent

(1) SHELL UK LIMITED
(2) SHELL UK OIL PRODUCTS LIMITED
(3) SHELL HOLDINGS (UK) LIMITED Appellants

- v -

OFFICE OF FAIR TRADING Respondent

AND

(1) J. SAINSBURY PLC
(2) SAINSBURY'S SUPERMARKETS LIMITED Interveners

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Mark Howard QC and Mr. Tony Singla (instructed by Ashurst LLP) appeared on behalf of the Appellants Imperial Tobacco Group PLC and Imperial Tobacco Limited.

Mr. Rhodri Thompson QC and Mr. Christopher Brown (instructed by Burges Salmon LLP) appeared on behalf of the Appellant Co-operative Group Limited.

Mr. Pushpinder Saini QC, Mr. Meredith Pickford and Mr. Tristan Jones (instructed by Hogan Lovells International LLP) appeared on behalf of the Appellants WM Morrison Supermarkets PLC and Safeway Stores Limited and Safeway Limited.

Mr. James Flynn QC and Mr. Robert O'Donoghue (instructed by Norton Rose LLP) appeared on behalf of the Appellants Asda Stores Limited, Asda Group Limited, Wal-Mart Stores (UK) Limited and Broadstreet Great Wilson Europe Limited.

Mr. Brian Kennelly (instructed by Baker & McKenzie LLP) appeared on behalf of the Appellants Shell UK Limited, Shell UK Oil Products Limited and Shell Holdings (UK) Limited.

Miss Helen Davies QC and Mr. Adam Aldred (instructed by Addleshaw Goddard LLP) appeared on behalf of the Interveners J. Sainsbury PLC and Sainsbury's Supermarkets Limited.

Mr. Paul Lasok QC, Ms. Elisa Holmes and Mr. Rob Williams (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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1 THE CHAIRMAN: Good morning ladies and gentlemen. I plan to work through the proposed
2 list of items at the end of the letter from the Tribunal to the parties of 11th October and I will
3 just run through what those are:
4 (i) Directions as to Sainsbury's intervention.
5 (ii) Structure and time estimate for the hearing.
6 (iii) Timetable for pleadings etc.
7 (iv) Disclosure of documents relating to the OFT's decision not to proceed against
8 Tesco; and
9 (v) The disclosure of confidential data underlying the parties' experts' reports.
10 Can I just have an indication as whether there are any other issues which anybody in the
11 room wants to add to that list?
12 MR. LASOK: So far as confidentiality is concerned there is one point about disclosure of
13 confidential material that is confidential to third parties to these proceedings.
14 THE CHAIRMAN: That is a general point, right. So what I propose to do then is say a little
15 about where the Tribunal is on each of those points – perhaps as we come to them rather
16 than running through them all at the beginning.
17 In order to assist the transcript writers I will probably say when somebody gets to their feet
18 who they are so that helps them attribute comments to the correct person; I think I recognise
19 most people in the room, but let us see how we get on.
20 Let us start then with the first point, which is the directions as to Sainsbury's intervention.
21 Where we are up to with this is that the Tribunal ordered that Sainsbury's can intervene on
22 two rather narrow points, one in relation to any potential claim for their costs at the end of
23 the day, and secondly in relation to any issues that arise as regards the disclosure by the
24 OFT or any other party of information which Sainsbury's regards as confidential to itself.
25 The Tribunal's current view is that there are no particular directions that need to be made
26 today, but if Miss Davies, if you have something different to say?
27 MISS DAVIES: Yes, madam. Can I say at the outset that in light of the Tribunal's ruling we do
28 not seek to join the confidentiality club or seek general disclosure, but we do ask for a
29 direction today that Imperial Tobacco be required to provide us with a non-confidential
30 version of their notice of appeal and I will, if I may, develop why we say that is appropriate.
31 We say at the present we only seek that direction in relation to Imperial Tobacco because, as
32 we understand it, from the correspondence that has taken place, it is only at the moment
33 Imperial Tobacco that is seeking to rely on the seven draft witness statements in relation to
34 which we have a claim for privilege and hence admissibility issues arise.

We have, of course, not seen any of the notices of appeal and in making that submission I am relying on what parties have said in correspondence, and of course I will be corrected by those present today, including the OFT if any other party is currently seeking to rely on those documents. I should also make clear that it is plain from the correspondence that we have seen that at least Morrison, and certainly potentially some of the other appellants, are reserving the ability to rely on these draft witness statements. Although the issue at the moment is only live as between us ITL and, of course, the OFT have to be involved in the debate, it is certainly not impossible that as these proceedings develop it may become live with other appellants. We understand that the OFT provided the draft statements to each of the appellants or all of them, so potentially they could. Morrison, in a letter dated 22nd July in response to our application to intervene, expressly stated that they are plainly entitled to use and rely on the documents should it decide to do so and such of the other appellants who said anything about this have simply said it is not their current intention to rely on Sainsbury's evidence. So, as matters presently stand it appears to be a live issue between us and ITL only, but of course that could change.

As to why we say it is appropriate to require ITL to give us a non-confidential version of their notice of appeal, as matters presently stand we only know that they are intending to rely on the statements and, indeed, that they have lodged them as part of the evidence supporting their appeals. Because we have not seen the notice of appeal we do not know to what extent that reliance permeates the notice of appeal and how extensive it is at all, although given some of the estimates that have been made as to time for this appeal it would suggest that there are some serious factual issues in dispute in these appeals, because otherwise one could not possibly anticipate an appeal of the length that has been proposed. At the moment, practically speaking, we do not know how much of an issue this really is and we have absolutely no desire to trouble the Tribunal with unnecessary applications if they can be avoided. If, pragmatically, having seen the notice of appeal, it is possible for us to reach a solution with the OFT and, of course, ITL, which means for example that there is no reference to the content of the confidential material in open court or in skeletons that might be a way, pragmatically, of avoiding what otherwise is going to be quite a complex debate for this Tribunal. It is going to require service of evidence by us and the OFT – we do not know if any other party wants to engage in evidence, but certainly by us and the OFT – then quite complex legal argument. Indeed, the OFT when it made its decision to release the draft statements to each of the parties expressly accepted that it was a very complex issue on which they had received extensive submissions from the various concerned parties. The scope of the issues is such that if there is a debate, for example, as to whether privilege

1 is ever engaged in relation to these statements at all one of the issues that will arise is
2 whether proceedings before the OFT are adversarial so as to attach litigation privilege. I
3 only mention that to explain why it is such a complex issue and it will take some time. So if
4 we can avoid all that we would like to see if we can, and for that reason we do say the first
5 step will be to require Imperial Tobacco to give us a copy of their non-confidential notice of
6 appeal, that should not be problematic or difficult; it must exist, they can give it to us
7 relatively quickly. There should be no concern about it as again they are all matters by
8 definition that are not confidential, and which it should not be inappropriate for us to see.
9 We will then see if we can engage in some sensible debate to avoid this application and, if
10 not, then we will have to make an application, directions will have to be agreed for service
11 of evidence, and a timetable for the hearing will have to be set aside. As we presently
12 consider it that will take over a day depending on how many parties engage.
13 So for all those reasons we do say the right way forward is first, to give us the notice of
14 appeal and then let the parties see if they can sort this out without having to trouble the
15 Tribunal with what would just be a distraction.
16 THE CHAIRMAN: Yes, thank you. Mr. Howard, what do you say about that?
17 MR. HOWARD: We say quite simply that it is not necessary for Sainsbury's to see the notice of
18 appeal whether in a redacted form or otherwise. As far as we can understand it the issue
19 that Sainsbury's wishes to raise goes to privilege. If there is a genuine claim to privilege
20 then they do not need to see the way in which we have deployed it, the material is either
21 privileged or not.
22 As I understand from what Miss Davies has said the concern they are now expressing is not
23 so much one of privilege but whether or not there is confidence, and whether the
24 confidential information would be disclosed in open court. Now, again they do not need to
25 see our notice of appeal. It would seem to us that the appropriate thing is for them to
26 explain what is in fact confidential about these seven witness statements which have been
27 deployed by ITL if the Tribunal is satisfied that there is a continuing confidence and
28 concern about those matters then the Tribunal can make appropriate orders at a later stage as
29 to how to deal with matters, in camera or otherwise, in order to protect the confidence, but it
30 is completely unnecessary for Sainsbury's to look at our notice of appeal in order to
31 consider those matters. All they need to look at is the statements which they themselves
32 have and to explain either why they are privileged or what is confidential in those
33 statements and how one ought to protect that confidence. That is ITL's position.
34 THE CHAIRMAN: Thank you, Mr. Howard. Miss Davies, is it your case that depending on how
35 this material appears to be being deployed by ITL that Sainsbury's may decide to waive

1 privilege or try and protect the confidence in some more limited way in order to enable the
2 information to be used to some extent rather than you insisting on the full right that you
3 maintain regardless of ----
4 MISS DAVIES: Yes, there are two points in that context, that is the first point. It is certainly
5 possible that, having seen how it is being deployed, we could agree to a further waiver. We
6 agreed to a waiver in relation to the use for the purposes of submitting responses to the
7 statement of objections in correspondence, but made it clear that we expressly reserved our
8 right to raise these issues before this Tribunal. I should make clear with respect to my
9 learned friend he appears to have slightly misunderstood what I was saying. We definitely
10 put our case on privilege, and because of the privilege that attaches to the draft witness
11 statements we therefore may seek to agree a regime which avoids that material being
12 deployed in open court, as it were. That is one way of dealing with this.
13 The second point I should make is that the issues that arise in relation to these statements
14 are not only as to whether they were privileged in the first place, which is a point I
15 mentioned in opening, but secondly, the extent of the waiver that my clients undoubtedly
16 gave to the OFT when it sent the statements to the OFT for the purposes of investigation.
17 One of the points that the OFT has made in correspondence is that at the time that we
18 disclosed the statements to the OFT it was anticipated that the statements would be used for
19 the purposes of conducting interviews of the seven Sainsbury's employees, and some of the
20 content of the statements, so the OFT points out, finds its way into the transcripts of those
21 interviews, which have been disclosed as part of the OFT's file.
22 Again, it is possible, therefore – we do not know, because we do not know what use is being
23 made of them at the moment – in terms of the arguments as to waiver, the actual way in
24 which they are being used by Imperial Tobacco could impact on the merits of the arguments
25 that are being made. If they are, for example, only seeking to rely on parts that were
26 actually referred to in the interviews themselves, that could affect the legal arguments. So,
27 with respect to my learned friend, it is not only a question of pragmatism, it is actually also
28 potentially impacting on the debate that might have to occur in this Tribunal if we cannot
29 find another way of dealing with it.
30 THE CHAIRMAN: Mr. Lasok, do you have any comments on this?
31 MR. LASOK: We have no observations to make on the application made by Sainsbury's in
32 relation to this question of disclosure of a non-confidential version of the ITL notice of
33 appeal. We are neutral. It may be of relevance to the Tribunal that for our part we would
34 see no objection to giving Sainsbury's a non-confidential version of our defence to the ITL

appeal, but that, I think, does pre-suppose that the Tribunal makes a ruling concerning the notice of appeal.

(The Tribunal conferred)

THE CHAIRMAN: Yes, thank you. I think that is all we need to hear on that point. What we will do is make some progress through the list of things and then we will retire briefly and come back with what we have decided in relation to those items which we can decide this morning. So thank you everybody on that point.

As far as the structure and the time of the hearing is concerned, as people are probably aware, now that the Pay TV appeal has been fixed for the May through to July slot this year, this appeal is likely to be fixed in the September to November slot. We would envisage starting it in September, possibly on Thursday, 15th September next year, which would then take us through to mid-November of next year.

The Tribunal is considering whether to sit four days rather than five days a week, which of course extends the overall period, but makes it a little more civilised. Naturally, if Panel Members have some existing commitments that mean that the free day per week is likely to move around a little bit rather than always be on the Friday, or whatever other day is chosen, but what we envisage is that once we have set a start date we will notify the parties of those days that we know that we will be not sitting, and other than that we will run through until we finish.

As I think we indicated in the letter, we indicated in the letter we accept at the moment that we will split the penalty from liability issues, particularly because of the inter-relationship between some of the issues raised and the construction appeals, and of course bearing in mind the possibility of appeals from the judgments of the Tribunal on the construction cases, if there were to be any.

Many thanks to you, ITL, for your work on the possible structure of the hearing and the timetable for the hearing which, of course, at the moment is very provisional, and particularly does not, as we can see, allow any time for the OFT witnesses prior to the defence. Of course we do not know what that position is going to be.

That is where we are as regards the hearing next year. Does anybody want to make any comments on that at the moment? Mr. Lasok?

MR. LASOK: Madam, may I say that it is extremely useful to have made the progress that the Tribunal has made. We would respectfully submit that at this stage it might not be appropriate to go into greater detail regarding the structure of the hearing. I think also Morrisons take the view that it would be better to have another CMC, probably in March of next year, at which point it will be more fruitful in terms of working out the appropriate

1 structure. We have done our own calculations. We think that on one permutation at any
2 rate the hearing might be shorter than envisaged, but it would still be prudent to have the
3 time slot that the Tribunal envisages. If it is shorter that is good for everybody, but if it is
4 not shorter then it is much better to have got the longer period in people's diaries.
5 THE CHAIRMAN: Yes, thank you. I am not sure we can make much more progress as regards
6 the structure of the hearing at this stage, but we were pleased that people took on board the
7 point that was made in the initial letter about having to deal with it agreement by agreement
8 rather than appeal by appeal, even if that then means that some witnesses may have to give
9 their evidence on more than one occasion in order for the evidence not to come out in a
10 rather disjointed way, but we can, of course, consider the matter further in due course.
11 Mr. Howard?
12 MR. HOWARD: Could I just raise one question: consolidation of the appeals and intervention.
13 As I understand it, the Tribunal is proposing not to make any order at this stage, but to re-
14 visit that after close of pleadings. Would that come back on to the agenda at the resumed
15 CMC?
16 THE CHAIRMAN: Yes, I think that is right, both as regards to consolidation of the appeals or
17 any parts of them and the question of the parties' interventions in each other's appeals. At
18 the moment the Tribunal cannot really see what there is to be gained by taking formal steps
19 in either of those directions, but certainly we are not closing the door on any future
20 developments in that regard.
21 MR. HOWARD: I think we are not concerned obviously with how one deals with things
22 formally, but just to ensure that ITL has an opportunity to participate in each of the appeals,
23 bearing in mind that it is obviously affected by them all. I think that is understood by
24 everybody.
25 THE CHAIRMAN: Yes, that certainly is understood, yes. Mr. Lasok?
26 MR. LASOK: I apologise for jumping to my feet again. In relation to the question of witnesses,
27 we would hope that it could be organised in such a way that witnesses were dealt with in
28 one fell swoop rather than having to come in and out of the witness box, but that is
29 obviously something that depends upon decisions that will be made at a later stage about
30 how things are organised.
31 THE CHAIRMAN: Yes. All I am doing is anticipating that there may be a trade-off between
32 convenience and coherence as far as how the evidence is taken in these appeals. Does
33 anybody else want to say anything further in relation to structure and time estimate for the
34 hearing. Mr. Thompson?

1 MR. THOMPSON: Yes, it is merely the mirror image of Mr. Howard's submission. We take no
2 formal position on intervention or consolidation but given the overlaps here we, as a
3 retailer, would want to be able to comment on anything that emerged in other appeals given
4 the extent of the overlap between the issues and to have access to documents, but that seems
5 to us a practical rather than a doctrinal question.
6 THE CHAIRMAN: Yes, thank you. Timetable for pleadings, etc. We proposed in our letter a
7 timetable the first step of which was OFT to file and serve its defence or defences on
8 30th November, which is a slightly shorter period than the OFT were asking for, but slightly
9 longer than the appellants were suggesting that we give. In fact, that date is problematic for
10 practical reasons for the Tribunal, so it is likely to be pushed a little bit into December. The
11 difficulty we see with 17th December, which is what the OFT suggested, is that effectively
12 means that nothing further happens until the beginning of January of next year which, given
13 the timetable we are working to may not matter particularly, but let us hear what people
14 have to say.
15 The next step then is for the appellants to file and serve replies on liability. As far as the
16 defence on penalty is concerned, at the moment the Tribunal is considering whether that
17 should be left open again until we know a little bit more about the judgments in the
18 construction cases and whether there is going to be any appeals to the Court of Appeal from
19 any points of law that arise in those which, given some overlap between the issues that were
20 raised in the construction cases, and the issues that are raised in these appeals, it might be
21 useful for any of those to be resolved.
22 Then there is the step of the parties informing each other of the witnesses they intend to call
23 for cross-examination, and then we start working back from the date of the hearing in
24 relation to skeletons and bundles.
25 As far as skeletons are concerned, it is going to be very difficult to avoid having a deadline
26 for the service of skeletons that falls in the middle of the Pay TV appeal but we hope that
27 provided everyone has enough notice of what these deadlines are the parties will be able to
28 make appropriate arrangements. As far as the Tribunal is concerned, we are very keen that
29 we get the skeletons together with a core bundle of documents at the same time and
30 substantially in advance of the start of the hearing because we are sure that the hearing will
31 go along much more smoothly and more rapidly if we have an opportunity to prepare fully
32 for what is going to unfold during the course of the hearing.
33 We raise the possibility of splitting the skeletons between legal issues and factual issues, the
34 possibility of ITL lodging their skeleton first, particularly on legal issues before the other
35 appellants do so in order to avoid any duplication, possibly the other appellants submitting a

1 joint skeleton on some issues and all those are matters we can discuss. It is sometimes
2 useful to have, as I have suggested, a core bundle served at the same time as a skeleton, so
3 when we are doing our preparation we can cross-refer to the key documents; those key
4 documents may well include the numbered documents which are referred to in the decision
5 in respect of each agreement on which the OFT relies as evidence for the existence of the
6 particular agreements, or how the agreements were implemented. To some extent, of
7 course, we are in your hands, and you are well placed to ensure that the case is presented
8 properly to the Tribunal and we have every confidence that you will do so but those are
9 some of the thoughts that are going through our minds as to how best for everyone to
10 prepare.
11 The authorities' bundle can come along a little bit later, perhaps. We will issue our usual
12 plea to keep the authorities' bundles to the minimum, but that is a plea that so far in these
13 appeals tends to fall on deaf ears, although of course we do not know what we would have
14 got if we had not made that plea, but certainly there should be a joint authorities bundle put
15 together if the parties can liaise to that effect. So that is where we are with our thinking.
16 Mr. Lasok, I think it probably falls to you to comment first on that.
17 MR. LASOK: So far as the defence is concerned, the reason why we put in the 17th December
18 date in the letter that we sent to the Tribunal and circulated to the parties was because that
19 was at the time and remains our genuine good faith estimate of the earliest practicable date
20 by which we could produce the defences which, of course, would in the ordinary course go
21 in together with any experts' reports and so forth. It was not put in there as a negotiating
22 ploy, it was a genuine estimate, and therefore we would respectfully submit that 17th
23 December was an appropriate date in the greater scheme of things. It does not, we
24 respectfully submit, matter if it were not the 30th November as the Tribunal had proposed
25 earlier, as opposed to 17th December.
26 In relation to that, one of the problems that we have had to face is that in order to get experts
27 to respond to the experts' reports that have been submitted by the other side, we have to go
28 through a transparent procurement exercise which takes time. There has been time taken up
29 trying to get the experts into the confidentiality ring, and these have all actually delayed the
30 progress of commissioning the experts and getting their work going, but that simply is
31 support, in our submission, of the point that I have made earlier, that 17th December is our
32 reasonable best estimate.
33 I do not know whether the Tribunal wants any formal submissions on the rest of the
34 timetable. We would respectfully submit that it is a good idea to have such things as the
35 skeletons together with core bundles, because in our submission if the Tribunal has all that

1 material well in advance, and is able to read in effectively and efficiently, that ought to short
2 cut things at the beginning of the hearing. One of the things in fact that we had been
3 thinking about was devices such as taking the skeleton arguments as a written opening so
4 that the oral submissions at the start could be kept to the minimum, and we could go
5 effectively straight into the witnesses of fact. Really, so far as the structure of the skeletons
6 is concerned, in our submission it is really a matter for the Tribunal, because it is what the
7 Tribunal feels will be most efficient for it in terms of getting through the case. The only
8 thing that I would add is what I said earlier this morning, that it might be appropriate to fit
9 in a CMC round about March so that we can take stock at that stage and tie up any loose
10 ends and the Tribunal can then make more precise directions as to the process leading up to
11 the commencement of the hearing and the structure of the hearing itself.
12 DR. SCOTT: We had in mind that in creating the core bundle not only will we need the
13 documents upon which OFT rely, but also in relation to each agreement any other
14 documents upon which appellants may wish to rely, so that we have in relation to each
15 agreement a set of the pertinent documents without having to go to the wider range of
16 documents, although we can do that it would be much more convenient to have in relation
17 to each agreement the documents on which everybody is going to rely.
18 THE CHAIRMAN: Mr. Howard, do you have any comments you want to make?
19 MR. HOWARD: In relation to the timetable we are simply concerned about having sufficient
20 time for our reply. We would have preferred to have seen the OFT's defence at the end of
21 November. If, on the other hand, they say they cannot practically do it until 17th December,
22 well so be it, but we would have asked if it had been 30th November to have until the end of
23 February for our reply. That is for a number of reasons, including the fact that ITL
24 effectively shuts down for two weeks over the Christmas period, but if they are not going to
25 serve their document until 17th then we would ask until mid-March which gives us 10
26 working weeks for our reply.
27 As to the way in which we deal with skeletons and core bundles, obviously the suggestions
28 are extremely sensible but we would suggest we revisit this at the resumed CMC by which
29 time the appellants in particular will have had an opportunity to liaise to decide how they
30 wish to co-ordinate, and either we will, hopefully, co-ordinate on, say, issues of law or
31 alternatively we can see the force in ITL producing its submission first and then the retailers
32 putting in theirs; that may be the preferred course, but can we come back to that.
33 THE CHAIRMAN: Yes, thank you. Does anybody else wish to make comments on this aspect.
34 MR. SAINI: Madam, may I just indicate on behalf of Morrison and Safeway, as I understand it
35 the Tribunal is not minded to make any firm directions other than a timetabling, and there

1 are no firm directions to be made today in relation to the structure of the hearing, skeletons
2 or core bundles. We were rather alarmed by the suggestion by Mr. Lasok that the Tribunal
3 in a case of this complexity could do without oral openings. But, as I understand it, echoing
4 what Mr. Howard is saying, the Tribunal is not going to make any such orders today.
5 THE CHAIRMAN: No, I certainly would not make any direction in that regard. I think that the
6 longer the gap between the lodging of the skeleton and the starting of the appeal the more
7 difficult I think it is that there are no opening submissions, but let us se where we get to
8 with that.
9 MR. SAINI: May I just make one further observation? I know certainly I am not in the Pay TV
10 appeal but I think others here are and if that is finishing in early July I think we might just
11 need to factor that into the timetable for skeletons, because certainly I know Miss Rose,
12 whose Junior, Mr. Kennelly is here, is involved very heavily in the Pay TV case for Ofcom,
13 I am sure her clients would want her to have time to devote to the preparation of this case.
14 THE CHAIRMAN: Yes, that was the point I was making, Mr. Saini, that we do not see how we
15 can avoid having the date for skeletons happening before the end of the Pay TV case,
16 because then if we delay the skeletons until the end of July, say, that does not leave us with
17 enough time to prepare properly for the appeal if it starts mid to late September, and the
18 parties will just have to make arrangements to square that circle.
19 MR. SAINI: Yes, madam.
20 THE CHAIRMAN: Do you have anything to say about that, Mr. Kennelly?
21 MR. KENNELLY: Mr. Saini has made my first submission, which is just that; Miss Rose, who is
22 not here, but she is leading counsel for Ofcom in that case, and so she has an important role,
23 and she will also have an important role in our skeleton, but you have heard the submission
24 and the Tribunal has heard the submission and we cannot say more than that.
25 We have one further observation, since I am on my feet, in relation to suggestions for
26 skeletons which you have made, just to put down a marker that while we can see the sense
27 in ITL going first, and to avoid duplication, certainly, in our view, it would not be
28 appropriate for the other appellants to put in a joint skeleton, including Shell, because as
29 you have seen from our notice of appeal Shell is in quite a different position to the other
30 appellants. We say we had no power to fix prices for the retailers because of the franchise
31 arrangements that we had for most of the relevant period, and therefore we had quite
32 different issues of fact and of law arising on our notice of appeal so we will need to put in a
33 separate skeleton.
34 THE CHAIRMAN: Yes, thank you.

1 MR. FLYNN: On behalf of Asda, madam. I was grateful to Mr. Saini, because I would not want
2 to be making any self-interested submissions about timetable and the interaction with Pay
3 TV. You have heard the arguments Mr. Kennelly has made and we hear what you say, but
4 it is going to put a big squeeze on those who are involved in that extremely heavy case, and
5 I think I would at least wish that to be noted.
6 Could I simply support Mr. Howard in relation to the date for replies, because as we have
7 noted if the defence does not come in effectively until just before Christmas it will take
8 time, and our position is that two of our three witnesses are no longer with the company –
9 one of them is retired – and it will inevitably take time to get instructions and have things
10 put together, so I would support him in a mid-March date, or whatever the Tribunal will
11 indulge us with.
12 MR. THOMPSON: I can be very brief. I adopt Mr. Howard's point about the reply. I am
13 perhaps a little more sceptical than others have been about the justification of the OFT's
14 position but obviously that is a matter for the Tribunal. It seems to us they could have
15 probably identified experts some time in the seven years of their investigation rather than
16 waiting until now, but that is obviously water under the bridge in one sense.
17 So far as the skeletons go, I think our current position is that we are likely to have quite a
18 distinctive position in relation to the issues of fact that we say are relevant to the questions
19 of object and, indeed, the Exclusion Order and we doubt that there is going to be a great
20 gain in having an attempt to have a common skeleton, and we also think that give the
21 number of parties involved it is unlikely to be an efficient process, to try and agree a
22 common legal position, even on matters that might – superficially at least – seem to be
23 common issues. So we doubt that that will be useful but we do not think it needs to be dealt
24 with now.
25 THE CHAIRMAN: We are not going to push the parties in any particular direction. We were
26 just making suggestions as to possible ways of reducing the amount of work rather than
27 increasing it for everybody concerned.
28 Let us then deal with the point that you were going to raise, Mr. Lasok, about disclosure of
29 third party material, and then I think we will probably take a short break before we come
30 back to the two other disclosure issues. Is that convenient, Mr. Lasok?
31 MR. LASOK: Certainly. The OFT has agreed to provide the parties with confidential versions of
32 the decision, the statement of objections and the file as part of the confidentiality ring.
33 Those documents also contain some confidential information relating to non-appellant
34 parties. For that reason we would submit that the Tribunal ought to direct disclosure by us
35 to the confidentiality ring, but on the basis that the non-appellant parties concerned will be

1 given an opportunity within a time period fixed by the Tribunal to make submissions to the
2 Tribunal as to whether or not the material in question should not be disclosed, and if not
3 why not. The reason for that is that, in our submission, it will be fair to those non-appellant
4 parties to give them an opportunity to make submissions to the Tribunal on the question of
5 disclosure should they wish to do so.
6 THE CHAIRMAN: Is the process that you envisage then that the OFT will write to these third
7 parties drawing their attention to the confidential information that is about to be disclosed
8 and ask them to either agree or ----
9 MR. LASOK: Or write to the Tribunal expressing the reasons why they disagree with disclosure.
10 The question is whether one, when one writes to them, says that they must write to the
11 Tribunal within seven days or 14 days. We have got no views on that. It is just that it
12 would be right, in our submission, to give those third parties, firstly, warning of what is
13 going to happen, and secondly, the ability to make their submissions, but they would be
14 submissions to the Tribunal.
15 THE CHAIRMAN: Yes. I am trying to envisage what kind of directions we would make then.
16 We would make ----
17 MR. LASOK: If the Tribunal was amenable in principle to that approach, we would be perfectly
18 happy to draft a form of words to be provided to the Tribunal and the appellants for their
19 comments.
20 THE CHAIRMAN: Yes. Does anybody else have anything they want to say on that point? I
21 cannot imagine that they do. We agree that makes sense. Clearly the third parties need to
22 be notified that disclosure is about to occur to the confidentiality ring, although it may be
23 that, given the historic nature of a lot of this information, they are prepared to allow
24 disclosure more widely than that. I think the request to them, or the notification, should
25 perhaps raise the possibility of them identifying that the material, if any, is still confidential;
26 and, if so, where they have any objection, they should identify that material and then say
27 whether they are content for it to be disclosed to the confidentiality ring. It may be that a lot
28 of the information, in fact, is no longer regarded as confidential by the third parties, and
29 therefore does not have to be limited in that manner as far as disclosure is concerned.
30 MR. LASOK: Would you like the OFT to provide a draft form of words?
31 THE CHAIRMAN: I think that would be very helpful, yes, Mr. Lasok.
32 We will rise briefly then to discuss what we have so far considered. When we come back at
33 11.30 we will then move on to the disclosure of documents relating to the decision not to
34 proceed against Tesco and the confidential data underlying ITL's experts' reports. If there

1 are any people in the room who do not consider that they need still to be here to discuss
2 those two issues they can certainly depart as far as we are concerned.
3 We will rise now and come back at 11.30.
4 (Short break)
5 THE CHAIRMAN: On the point about the direction in relation to Sainsbury's intervention, we
6 are prepared to direct ITL to disclose a non-confidential version of the notice of appeal to
7 Sainsbury's. This is on the basis that Sainsbury's intends thereafter to consider carefully
8 how far it is able to waive any claims that it has either to privilege or confidentiality. It is,
9 of course, very important that the Tribunal has all the relevant facts in front of it when it is
10 considering these appeals, and we make that direction in the expectation that Sainsbury's
11 will bear that in mind as regards the claims it chooses to pursue.
12 On the timetable, we will make the following directions: defence on liability to be served
13 on 17th December; replies and any reply evidence to be served by 11th March; on 18th
14 March the parties to indicate to each other and to the Tribunal which witnesses they wish to
15 cross-examine and in relation to which agreements they intend to cross-examine them. We
16 will pencil in a date of 31st March for a further case management conference in these
17 appeals.
18 In that regard, let us float another suggestion. In respect of the expert evidence in this case,
19 it may be a good idea for the Tribunal to organise a non-adversarial discussion, teach-in,
20 meeting, at which the experts go through in an uncontentious way, if possible, what they
21 have done, what models they have used, what the methods they have applied are. I think
22 there were some counsel and solicitors involved in the *Carphone Warehouse* appeals where
23 we did have a morning where the experts came and explained to us how the model that they
24 had constructed had been put together and how it operated. In fact, in that appeal the issues
25 went away. I know I found that very helpful and I think other Panel Members did as well.
26 It may be that there is scope for some such type of initial hearing in that regard in this case.
27 I just put that possibility on the table for people to consider. That is another CMC on 31st
28 March.
29 We will also make an order in relation to the hearing window, which we will say is going to
30 fall between 15th September and the end of November – obviously that is more weeks than
31 we are going to need, we hope – and we will notify you when we make the order as to what
32 dates within that period the Tribunal is not able to sit, so that you know that those days will
33 not be hearing days.
34 We do not propose at the moment to make directions as to the timetable for skeleton
35 arguments and the core bundle other than to say this: that we would expect that all the

1 skeletons in whatever order they come in and the core bundle will be lodged with the
2 Tribunal by no later than 24th June, so that the timetable that will be set at the CMC on 31st
3 March will have as a goal all the material to be lodged with the Tribunal, not necessarily the
4 authorities bundles, but certainly the skeletons and the core bundle to be lodged by no later
5 than 24th June, in order to give us time to prepare.
6 Finally, on the third party disclosure, as I indicated, we will make that order as suggested by
7 Mr. Lasok, if the OFT will provide us with some appropriate wording in due course.
8 That is where we are so far.
9 MR. HOWARD: Could I just raise a question about the disclosure to Sainsbury's. You may have
10 seen from ITL's notice that the Sainsbury's matter is actually dealt with in an appendix,
11 number 7, which is pretty lengthy, and that is what sets out all of the relevant material and
12 issues relating to Sainsbury's. We would suggest that in order for Miss Davies and her
13 clients to consider the position they do not need to see the entirety of the notice of appeal,
14 because we have a separate appeal relating to each of the retailers, and it would be sufficient
15 for them to see that section. We would ask that that is what we should be disclosing.
16 THE CHAIRMAN: Can I ask you to discuss that with Miss Davies, and if you could come up
17 with some wording for an appropriate direction for us to make, given the indication that we
18 have given as to our thinking, then I am sure we will be able to accommodate that.
19 MR. HOWARD: Thank you.
20 MISS DAVIES: Mr. Howard raised that with me just before we came back into the hearing. Our
21 concern about it is that we do not understand that the annex contains the only references to
22 Sainsbury's and Sainsbury's evidence. In fact, as one would expect, given the nature of the
23 decision and the heavy reliance, for example, that was placed on Miss Bayley's evidence,
24 there are likely to be numerous other references throughout the notice of appeal of relevance
25 to these proofs. We do not really understand the difficulty about this. We are only asking
26 for a non-confidential version of the notice of appeal. We can then see the full extent to
27 which the references are being used and relied upon. We are very mindful of the direction
28 that the Tribunal has just given. We can then take an informed view and try and find a way
29 of resolving this. Having partial disclosure of the notice of appeal at this stage is just going
30 to lead to extra cost and unnecessary debate about whether we have seen everything, and the
31 possibility of us having to take decisions without the full extent of the material being
32 deployed. So, with respect to my learned friend, I am afraid leaving it and trying to resolve
33 it subsequently is not, in our respectful submission, the correct way forward.
34 THE CHAIRMAN: The default direction, if I can put it like that, is that they should have the
35 whole thing. If you can, in discussion, limit that to some other smaller part then we will

1 limit the direction to that, but if you are not able to agree then I think the default position
2 should be ----
3 MISS DAVIES: I am very grateful. One very small point on timing. We would have thought it
4 would be possible to get it to us within seven days, given it must exist, but it might be
5 sensible just to fix a timetable for the provision of that.
6 THE CHAIRMAN: Is there any difficulty?
7 MR. HOWARD: It rather depends on whether we are limiting it to appendix 7 or we are going to
8 give the whole document. The whole document is a very lengthy document and that would
9 take some time and incur some costs. If we can agree to limit it to section 7 I suspect we
10 can do it in a relatively short period of time.
11 THE CHAIRMAN: We will direct that it should occur by 29th October. That gives you some
12 time both to have a discussion and then to do the practical business of disclosing it.
13 MISS DAVIES: Thank you.
14 THE CHAIRMAN: Now I think we turn to the point about the disclosure of documents relating to
15 the OFT's decision not to make an infringement finding against Tesco. We have seen the
16 OFT's letter of 13th October setting out their points. Who is going to kick off on that? Mr.
17 Saini?
18 MR. SAINI: Madam, I was going to make the primary submissions in relation to Tesco. I believe
19 that both Asda and ITL support the application and may have some submissions to add.
20 Can I just check what you have got there? You have got the OFT letter. There is a short tab
21 of correspondence, which I hope you have on your desks. That is the original letter from
22 my instructing solicitors and the OFT's response, which you have already seen.
23 THE CHAIRMAN: I have got the letter of Wilmer Hale of 10th May.
24 MR. SAINI: Then after that, or maybe before it in the clip you have got, there is a letter of 18th
25 May from the OFT, and then there is the letter to which you have just made reference,
26 madam. Can I also ask you to have, please, handy, the Morrison notice of appeal. It says
27 notice of appeal and has 16th June underneath it on the spine. Also the bundle of authorities.
28 There is one final bundle which I would ask you, please, to pull out, which is the ITL notice
29 of appeal, volume 1 of 3, the main notice.
30 Can I just give you some background, first of all, madam. The Tribunal will be aware that
31 originally Tesco's were being proceeded against by the OFT, and in the statement of
32 objections it was alleged that Tesco was a party to the infringing agreement, you will be
33 aware that Tesco is the market leader. Then suddenly out of the blue, when the decision is
34 made, the OFT decide to drop the proceedings against Tesco. It is not surprising that we,
35 amongst other parties, sought some disclosure following that decision.

1 Can I show you, first of all, a letter which you have seen, which is the 18th May letter in the
2 short clip of correspondence, on 10th May, as you are aware we made the request, prior to
3 submitting our notice of appeal. Can I ask you, please, to glance at the OFT's letter of 18th
4 May, and you will see that in the second paragraph there is express reference to a paper of
5 March 2010 submitted by the OFT to Simon Williams, and that summarised the team view
6 that the documentary evidence in relation to Tesco was not sufficient to prove that Tesco
7 had an agreement, and/or concerted practice. Then there was a recommendation.
8 Then over the page at 2, between (a) and (d) one sees various sub-paragraphs explaining the
9 particular reasons why Tesco was going to be allowed to drop out of it, and I will come
10 back to those in more detail in due course. Then there is another paper referred to, which
11 you will see, after (d), and if I may read it it says:
12 "In a paper sent to the Tobacco case team in April 2010, Simon Williams agreed
13 with the case team's recommendations …"
14 and this letter is meant to contain the reasons for the OFT deciding not to make an
15 infringement finding in relation to Tesco's conduct.
16 We know on the face of it there were two documents created: one from April 2010 and one
17 from March 2010.
18 We also know – it is an inevitable inference – that there must have been some
19 correspondence that went between Tesco and the OFT prior to the OFT's decision not to
20 proceed against Tesco. I will come back to that correspondence in due course because it
21 may be, and I am not quite clear on this from what Mr. Lasok said before the short break,
22 that the OFT's file that they are going to disclose is going to contain that correspondence,
23 but I will wait to hear what he says about that. There are essentially two types of document.
24 One is the internal papers ----
25 THE CHAIRMAN: Do you mean correspondence between the OFT and Tesco?
26 MR. SAINI: That is right, but I am not clear on that. If it is not going to be disclosed then I apply
27 for it as part of this application. Just to be clear, there are both internal documents that we
28 want, and certainly as a minimum those two documents; and secondly, any correspondence.
29 Before I turn to the notices of appeal and explain why that correspondence and those
30 documents are relevant to the issues in the case, the Tribunal will have well in mind the
31 statement of the *IBA* case, and I would ask you to turn it up, please. It is in the authorities
32 bundle, tab 10. If I can ask you to go to the end of it, please, to para. 105, the last page but
33 one in this tab. If I can ask you please, to look at para. 105 at the bottom of p.26 of 27, if I
34 may read it:

1 "In a case such as the present, where the subject matter is complex and the
2 supporting material voluminous, there is no statutory requirement for all the
3 evidence to be set out in the decision letter. However when a challenge is made,
4 there is, as the Tribunal noted, an obligation on the respondent public authority to
5 put before the court the material necessary to deal with the relevant issues; 'all the
6 cards' should be 'faced upwards on the table'."

7 We say that general principle must inform the Tribunal's approach to this disclosure
8 application and, indeed, must inform the Tribunal's approach throughout these proceedings.
9 In particular, it is a matter of great concern where serious findings have been made against
10 my clients and others that the OFT should resist so fiercely disclosing documents which
11 would explain a very puzzling decision on their part, and I will come on in due course to
12 explain why it is puzzling. It is a matter of great concern. You will also be familiar with the
13 general public law principle about the duty of candour and there are any number of cases
14 about that.

15 If I can ask you please next to turn to the pleadings, and we need to look at those because
16 you will have seen from the OFT's letter that applying the *Claymore* test they are saying
17 that these documents are neither relevant, necessary, or proportionate as matters to be
18 disclosed for the purpose of dealing with the case. The primary test of relevance in any
19 proceedings (including in these proceedings) will be the pleadings which define the issues
20 between the parties. If I can ask you, please, to turn to the Morrisons notice of appeal, and I
21 ask you to do this as a matter of brevity, and I will not take you to the Safeway one, but I
22 hope you will take it from me that similar points are made in the Safeway notice of appeal.
23 If I could ask you, please, first to go to p.23, which identifies at the top under "Ground 1"
24 our first and primary ground of appeal in this case.

25 The first ground of appeal is: "The OFT erred in concluding that Morrisons entered into an
26 agreement and/or concerted practice . . . to achieve the parity and differential requirements .
27 . . with …"

28 each of ITL and Gallaher. Then over several pages we explain our case in that regard. But
29 under that first and primary ground of appeal, we firmly rely upon the position in relation to
30 Tesco, and if I could ask you, please, to go to p.46. I should preface this by saying, to make
31 it absolutely clear, that it is not our case that Tesco were as guilty as us. Our position is that
32 Tesco were innocent and so were we. We are not running any sort of discrimination
33 argument, and when we look at the cases that are relied upon against us, we will say with
34 respect that they are irrelevant, because it is not our case that there has been some breach of
35 the principle of non-discrimination; our case is very, very different.

1 Our case, as explained in paras. 149 and 154, which I will not go through now, but the
2 Tribunal may wish to look at in detail in due course, is that each of the elements, which the
3 OFT identified, as the bases for dropping the case against Tesco apply in equal measure, to
4 the case against my clients and, indeed, I suspect against some of the other retailers, and
5 ITL. If I can take you through those, the first point, madam, and this is para.149 of our
6 notice of appeal, one of the bases for inferring that my clients were party to an infringing
7 agreement is that other retailers were parties to infringing agreements. Now, whether or not
8 that is right as a matter of logic, that is the way that the OFT pursue their case.
9 If, in fact, the OFT's case is that Tesco, as the largest retailer, was not a party to
10 infringement agreements then surely that must constitute evidence that none of the
11 appellants were a party to infringing agreements – so the OFT cannot have it both ways.
12 Secondly, one sees from the OFT's letter and from their case against us that one of the bases
13 upon which they find there is an infringing agreement is ITL's and Gallaher's overall
14 strategy for retail prices, that is used as a factor against my clients and others. But we know
15 that exactly those same strategies were used by ITL and Gallaher in relation to Tesco. So
16 why does the existence of those strategies support a case of infringement against us but then
17 not against Tesco.
18 The third matter that is relied on very heavily against ----
19 THE CHAIRMAN: What is the distinction then between the first two matters?
20 MR. SAINI: The first matter is it is said against my clients agreements existed between the
21 manufacturers and other retailers, and therefore "we infer from that sole fact that you were
22 also a party to an agreement". But they have decided that Tesco were not party to an
23 agreement, why does the inference not equally lie against Tesco?
24 THE CHAIRMAN: So the first point is the existence of the other agreements you say is relied
25 upon by the OFT ----
26 MR. SAINI: Indeed.
27 THE CHAIRMAN: -- to show that there must have been an agreement between your client.
28 MR. SAINI: Absolutely.
29 THE CHAIRMAN: Then the second point is the over all ----
30 MR. SAINI: The second point is that the manufacturers had strategies against ITL and Gallaher
31 and obviously our submission is that such strategies as they had were completely lawful, but
32 the evidence is that they had the same strategies in relation to Tesco. So again, why, if that
33 is evidence against us supporting the argument that we were party to an infringement
34 agreement, is it not also equally evidence against Tesco?

1 The third point and, in a sense, this is the most powerful point, is that the case against us
2 and against other retailers, relies very heavily upon the communications that took place
3 between the manufacturers and my clients. The OFT's case is that those communications
4 are damning evidence against my clients and the other retailers, but we know from the
5 disclosure that we have seen so far, that the communications that Tesco had with the
6 manufacturers was very similar. One can see this point pleaded, madam, at para. 150 in the
7 notice of appeal. So we are receiving communications, we are receiving promotional
8 bonuses in the same fashion as other retailers. If that is damning evidence against us why is
9 it also not damning evidence against Tesco?
10 The reason I show you this at this stage, madam, is because there can be no argument at this
11 stage in these proceedings that by reference to the notice of appeal, which is the primary
12 pleading, the decision to drop the complaints against Tesco is a central issue in these
13 proceedings.
14 The objection on the part of the OFT, while dressed up as an objection based on relevance,
15 is not really an objection based on relevance, because if one strips it down the argument is
16 essentially this, which is that "We know you are saying Tesco were in a similar position to
17 you, however, ultimately, whatever you may say about Tesco it will not assist you in
18 defending yourself." Now, that is not an argument about relevance, it is "This argument
19 that you are running will fail ultimately before the Tribunal." So one needs to distinguish
20 between arguments based on relevance, which are matters to be defined by the pleadings,
21 and arguments going to the merits. It may well be that when we finally finish this hearing at
22 some point at the end of next year and when we have seen all the disclosure from Tesco, the
23 Tribunal come to the view that it is very puzzling that there is a difference in approach
24 between the treatment afforded to Tesco and others, but ultimately that does not assist these
25 appellants, that is not an argument for now. The only argument for today is whether or not
26 these documents will be relevant.
27 If Mr. Lasok was going to be trying to strike out these paragraphs of the notice of appeal,
28 and arguing that in fact they disclose no relevant defence to the infringement proceedings,
29 that is a different matter, we are not having that argument though and, indeed, it would be
30 surprising if the Tribunal were to entertain such an argument.
31 The only argument today is whether or not the Tesco documents are relevant. That
32 threshold is easily passed. I have shown you ----
33 THE CHAIRMAN: These are different kinds of documents though, from the documents that you
34 are asking for disclosure of. There are two categories of documents, there are the
35 documents which are the raw material as it were, the documents as between ITL and Tesco,

1 and the evidence of the existence of an agreement between ITL and Tesco, and the
2 communications and whatever. We will hear from Mr. Lasok what has happened about
3 those – those are contemporary ----
4 MR. SAINI: Absolutely.
5 THE CHAIRMAN: -- source raw material documents, and I do not know whether they are on the
6 file, and whether they are going to be disclosed. But what it seems to me you are asking for
7 is a different set of documents, which are not contemporaneous documents about the
8 existence of an infringement by Tesco, but documents relating to the OFT's assessment of
9 that evidence and its decision to drop the proceedings against Tesco. Now, we must not
10 confuse the two categories of documents.
11 MR. SAINI: Absolutely, and it is the latter form of document that we are after, and this is a rather
12 odd case, and this is why they are relevant, because there are particular pieces of evidence
13 and I have taken you through some of the ways in which the OFT put their case which are
14 relied upon very heavily against my clients as supporting the OFT's case that there was an
15 infringing agreement. But it is extremely puzzling given that very, very similar material
16 existed in relation to Tesco that that same material did not give rise to the same inference of
17 an infringing agreement.
18 THE CHAIRMAN: But does it not help you rather than hinder you in your arguments that the
19 OFT is now stuck in a position where it has to maintain that there was no infringement or, I
20 do not know, they may have to stick with the position that there was no infringement by
21 Tesco, and from what you have said so far you will therefore be arguing that well that must
22 show that there was no fully implemented overall pricing strategy by ITL and Gallaher with
23 the retailers, because if they had such a strategy then Tesco, the market leader, would have
24 been number one person that they would want to implement that strategy. I do not see at the
25 moment how it helps you to cast doubt on the question of whether there was an agreement
26 between ITL and Gallaher and ----
27 MR. SAINI: We certainly would not wish to cast doubt on it but we want to understand the
28 OFT's process of reasoning, and it is quite clear that two papers were created, which were
29 identified in the letter that you have looked at earlier. Two papers were created which
30 persuaded the decision maker, Mr. Williams, that there was not a case against Tesco, and
31 we would wish to examine in due course, and it is going to be inevitable when the OFT
32 gives evidence, that one will need to go through why Tesco was treated in a different way
33 and we would wish to probe why the conclusions that were drawn in relation to Tesco in
34 those papers were not equally applied to my clients. We should not be guessing – this is my
35 basic point – we should not be guessing, which we are doing at the moment, the reasons for

1 Tesco being dropped. We know the overall conclusion, which is Tesco were dropped and
2 therefore it must follow the OFT accepts there was no infringing agreement with Tesco.
3 But, the building blocks towards that decision are something which we say we are entitled
4 to investigate, and it is extremely surprising ----
5 THE CHAIRMAN: What I am struggling with at the moment is suppose the OFT had said in
6 their letter: "We just decided there are too many investigations here so we put all the names
7 in a hat and we picked out the one that we were going to drop and that was Tesco, and that
8 was just their luck and your bad luck." Regardless of whether that would be a judicially
9 reviewable decision, whether or not it was a reasonable decision or whatever, that is
10 challenging a different decision. You are not challenging in your appeal the decision to
11 drop Tesco from the investigation or from the findings. What I am struggling with at the
12 moment is why anything beyond the raw material documents is actually relevant to your
13 case?
14 MR. SAINI: Because we need to know the precise reasons why they have dropped the
15 investigation. At the moment we are casting around guessing why they have done it. The
16 have entered into the arena with their letter and said there were these two reports and have
17 explained in not a huge amount of detail what was in those reports, but surely we are
18 entitled to probe that? We are entitled to know why evidence which is looked at, as against
19 us, as being damning evidence is not equally damning evidence as against Tesco.
20 I take your point, madam, which is that we can go partly along the road towards doing that
21 by just looking at the underlying contemporaneous evidence in relation to Tesco, but what,
22 we ask is the difficulty and what is the great secrecy of the OFT's own reasoning?
23 THE CHAIRMAN: But what is the relevance? To what issue in your appeal, your challenge to
24 the finding of infringement against you, to what issue in that appeal is the question of why
25 Tesco were dropped?
26 MR. SAINI: That is going, with respect, too far. The issue is certain items of evidence are relied
27 upon against my clients as showing that they were parties to an infringing agreement.
28 Those very same items of evidence exist in relation to Tesco, therefore, logically, how does
29 the OFT get to a position where that self-same evidence damns one retailer and is not
30 equally damning of another retailer? So we go primarily to the very first ground of appeal,
31 which is we were not in an infringing agreement, and we are entitled to test what the OFT
32 undertook by way of a reasoning process.
33 There is nothing here to hide and, as often happens with public authorities the more that the
34 public authority resists, and this may be a completely unfair view of the appellants, the
35 more that the appellants think there is some smoking gun here. But there is a burden upon

1 the OFT in this case to explain logically how the case against my clients, based on the same
2 evidence, can lead to a finding of infringement, yet that same evidence, or very similar
3 evidence it seems, does not lead to a finding of infringement against Tesco. Our submission
4 is that we are all innocent.
5 THE CHAIRMAN: But what would you regard as a "smoking gun"?
6 MR. SAINI: Well I have no idea, I am simply suggesting that it is not appropriate for a public
7 authority in the OFT's position to be withholding the contemporaneous reasons that were
8 given for treating certain evidence as against my client in a certain way and that same
9 evidence, as against Tesco in a different way. It is just unexplained.
10 THE CHAIRMAN: It must depend on the nature of the decision that you are challenging. If you
11 have brought an appeal against the decision, I do not know, for the moment assume we had
12 jurisdiction, which I have not looked at, but if you had challenged the decision of non-
13 infringement by Tesco then I could see your point, but I cannot see what smoking gun, or
14 not smoking gun, there could be in these papers.
15 MR. SAINI: Well I can give you a very simple example, madam, which is if the OFT have now
16 analysed the communications between Tesco and the retailers, and concluded in a document
17 that those communications do not support their original case that here was an infringing
18 agreement, why can we not, in cross-examination of the OFT's witnesses and in
19 submissions, say that that self-same principle applies to our communications?
20 DR. SCOTT: Mr. Saini, it seems to me that there is a difference between the situation in the *IBA*
21 case and the situation that you are putting to us now. In the *IBA* case and the paragraph that
22 you raised from Lord Justice Carnwath, what happened was a careful piece of work by
23 officials that led to an internal document which was heading in one direction. Shortly
24 thereafter they headed in a very different direction, and certainly in what were judicial
25 review proceedings, we, the Tribunal found that progress very fascinating. But it was the
26 progress towards the decision in relation to the parties with whom we were concerned, not
27 any parallel process. Here we are not looking at what was the underlying evidence of
28 communication with Tesco, what you are asking for is why do OFT reach their
29 administrative decision in relation to that evidence?
30 When we are doing an appeal on the merits should not your inquiries be directed to the
31 similarity or differences in the underlying evidence, rather than to the process of inference,
32 or non-inference conducted by the OFT, which seems to me to be of less relevance. It is not
33 in the chain in the same way the *IBA* material was.
34 MR. SAINI: Sir, I follow your point, but here we have a rather strange situation but as against all
35 of the retailers, certainly the communications between my clients, both Safeway, Morrison

and ITL, look on the face of it really similar to the communications between my clients and Tesco.

THE CHAIRMAN: But that is a point that you can put to the OFT witnesses without being able to put to them some preceding decision internal to the OFT. You can say, if we have what I have referred to as the 'raw material' documents, the communications between ITL and Tesco, the point is there: "Look at those communications and look at our communications, and yet there is no finding of infringement against Tesco, why is there a finding of infringement against us?"

MR. SAINI: But part and parcel, madam, of the cross-examination of those witnesses will be their contemporaneous decisions in relation to Tesco, and my clients will be entitled to have records of those decisions, otherwise it is a rather difficult cross-examination where we have in existence two documents which record conclusively, it seems, the reasons for not pursuing Tesco, yet we would be trying to conduct the examination of those witnesses who will be giving their evidence without reference to those documents. There is no doubt that that is going to form a central part of the case. It is puzzling in the extreme that the OFT will not be willing to hand over those documents because they know they are going to have to explain the position. What we are saying at this stage is: "Provide those documents to us now so that if we need to amend our notice of appeal we will do so" rather than us waiting until the witnesses go into the witness box and we ask the question, and we all know there will be an elephant in the room, we know there are these two reports. The witness will perhaps be saying: "I did write this all down", and we will be looking back a year ago, "We applied for disclosure of these and the OFT resisted it." It is inevitable that it will arise. I do not say it is a point which is tangential, it is a point which is front and centre in our appeal. It is just, with respect, surprising that the OFT would fight so bitterly to resist disclosure. It is clear that they do not regard the document as being privileged in any way, because in the letter we have seen they have gone into some detail about the contents of those two documents. What is wrong with handing them over, because they are going to form a central part of our case in this appeal.

Can I also make it absolutely clear – I do not want to take too much time over this – but the cases that the OFT rely upon in resisting our application are, with respect, irrelevant because those are cases in which the complaint was made that you pursued me for infringement, and you did not pursue somebody else who is in exactly the same position, I am complaining about discrimination." That is not our case. Our case is more subtle than that. Our case is: why does the evidence, the underlying evidence, which exists both against my clients and against Tesco, why does it in one case lead to an inference of infringement,

1 and in another case no inference? So it is a very, very different position. I will not take
2 your time now by going through those cases.
3 THE CHAIRMAN: No, I understand the point.
4 MR. SAINI: I should also just make the point – no doubt Mr. Lasok will clarify the position of
5 the OFT on this – as I said at the outset, there are two types of documents, one is the
6 internal documents, the other set of documents is the correspondence. I may have
7 misunderstood Mr. Lasok before the adjournment but, as I understand it, subject to the
8 confidentiality provisions the OFT is going to disclose its file of materials. My
9 understanding is that file of materials up to the date of the decisions against my clients, will
10 include material in relation to Tesco. If we are going to get that material, that is the
11 correspondence between the OFT and Tesco through that route, then I do not need to do it
12 by way of this application, but it is not clear to me whether or not the OFT are going to
13 provide that.
14 That is my application, madam.
15 THE CHAIRMAN: Yes, Mr. Flynn.
16 MR. FLYNN: Madam, I will not take a great deal of the Tribunal's time, because we made a
17 similar application and you will have seen that in our letter of 30th September to the
18 Tribunal preparing for this CMC, which attached our similar correspondence with the OFT
19 on this issue, and made illustrative references to our notice of appeal where these points
20 come up. I think in fairness to everyone here I think I can simply adopt *mutatis mutandis*
21 what Mr. Saini has said on Asda's behalf, if that is an acceptable way of proceeding before
22 the Tribunal.
23 THE CHAIRMAN: Yes, perhaps you could just take us to the paragraph in your notice of appeal
24 where you make the point about Tesco.
25 MR. FLYNN: In our letter, madam,
26 DR. SCOTT: Are you in your letter or your notice of appeal?
27 MR. FLYNN: I was looking to our letter for the paragraphs to which we had referred you, and
28 the paragraphs there, if you have the letter in front of you and, as I said, these are
29 illustrative. We had paras. 122 and 174 in relation to the reasons why the Tesco case was
30 dropped.
31 THE CHAIRMAN: Paragraph 122 and ----
32 MR. FLYNN: 122 summarises some evidence in relation to Tesco, and concludes:
33 "It is unclear why this evidence was considered good enough to exculpate Tesco
34 but is, apparently, a matter of no moment when it comes to Asda."

1 We referred you to para. 174 which is in relation to adherence to parities and differentials,
2 where we say that it is apparently:
3 "… an important part of Tesco's submissions to the OFT leading to the case
4 against it being dropped were that it priced inconsistently with … those
5 instructions '*in well over 50% of cases'*." Asda appears to have been even less
6 consistent with P&Ds."
7 Those are two paragraphs to which we referred you and the other paragraph to which we
8 referred you was 118, which was the introduction, I think, to the section to which I have
9 already referred you. There is, of course, plenty of evidence and plenty of play on that
10 evidence in our notice of the fact that, for example, one of the factors said to lead to the
11 decision not to proceed against Tesco was that what it was essentially doing was matching
12 the others (and principally Asda) where we say that is sauce for the goose. Those points are
13 plentifully made in the application.
14 Madam, what we say here is that this is not a case where someone is saying, "Oh, you have
15 let a member of the cartel get away". It is not that sort of case that the Court of First
16 Instance has had to deal with in the past. This is, in effect, a fully reasoned stance by the
17 OFT that there has been no infringement by Tesco. We have only seen a summary of those
18 reasons. We say it is important for the Tribunal, in understanding the theory of the case that
19 is being put against Asda and other retailers before you, to understand the OFT's reasonings
20 in full and with the appropriate weighting. Was it the price matching? Was it the absence
21 of written agreements? What are these factors? That should be done through the
22 contemporaneous documents, those case team papers which have been referred to, they
23 clearly exist. There should not be anything confidential or secret about them, and you are
24 entitled to see them rather than some later summary and possible spin of those. You should
25 see those in their raw state in the same way as you see the communications between
26 retailers and manufacturers.
27 In a case where the OFT's essential theory of this infringement is has, as we say probably at
28 inordinate length in our notice of appeal, chopped and changed over the years, one really
29 wants to understand what is the nature of the infringement which is said to have been
30 committed here, and if one has not been committed by Tesco why has it been committed in
31 my client's case by Asda. That is essentially what this goes to.
32 THE CHAIRMAN: Yes, thank you. Yes, Mr. Howard?
33 MR. HOWARD: ITL makes the same application for disclosure in relation to the two reports.
34 The position ----
35 THE CHAIRMAN: That is the two documents referred to in the OFT ----

1 MR. HOWARD: That is right. In relation to ITL's notice of appeal, this is dealt with in section
2 5, the significant thing to note is that ITL is actually in a slightly different position of course
3 to the retailers in that what is being said by the OFT is that ITL had anti-competitive
4 relationships with each of these retailers, but they have looked at the position with Tesco, to
5 which ITL was a party, and they are necessarily saying that ITL's arrangements with those
6 did not fall foul of the Competition Act.
7 What they have not explained is what it is that distinguishes ITL's relationship with Tesco
8 from ITL's relationship with the other retailers. What we have said, if you go to section 5
9 of our notice of appeal, is that there is no relevant basis upon which to distinguish the two.
10 It starts at p.96 of our notice of appeal and runs through to p.104. Perhaps I can pick out
11 some of the key points. You will see in the background and summary we recite the fact that
12 Tesco had actually signed a leniency agreement in which they admitted having entered into
13 agreements with both the object and effect of infringing the Act, although then the OFT has
14 abandoned their case.
15 At 5.4 we say that there is no reason to distinguish between the nature of the conduct
16 engaged in by ITL with Tesco as against the other retailers, that the same commercial
17 strategy and the same mechanisms to fund lower shelf prices were used and thereby
18 increased the sales volume of ITL's brands with Tesco as with the other retailers. As has
19 already been submitted to you, undoubtedly at the hearing next year there is going to be on
20 ITL and the retailers' side an investigation of what is it that distinguishes, and the OFT says
21 distinguishes Tesco and ITL's relationship with Tesco from ITL's relationship with the
22 other retailers. At the moment, we can only really guess at what is part of the OFT's
23 reasoning. We do not actually know, unless we see these two reports that went to Mr.
24 Williams.
25 What we have set out here is what we infer had been the basis of the OFT's decision. Then
26 we have explained why, if that is the basis, it shows that exactly the same type of situation
27 exists with the other retailers and therefore there is not a basis for a claim of infringement
28 against ITL in relation to the other retailers.
29 Just as a matter of obvious commonsense, it is going to be a lot better for us to actually
30 properly understand what the OFT's reasoning was rather than, as it were, shadow boxing.
31 That is just, I would suggest, a matter of efficient case management.
32 If you follow through our notice of appeal in this section, you will see that initially, and this
33 really highlights the similarities, what was being said by the OFT at 5.7 in the SO – you can
34 see what was said there – essentially the critical aspects to it were that the nature of the
35 contacts between ITL and Tesco and then the pricing instructions were received and

1 implemented. Tesco responded with essentially two points. One is that they said, "Ah, we
2 have not got written agreement with ITL"; secondly, they said, "If you do an analysis of the
3 extent to which we followed the strategy" – this was called the adherence analysis – "you
4 will see that actually in less than 50 per cent of the cases did we do that".
5 If one looks at the position with the other retailers, there are a number where there are no
6 written agreements, so they are on all fours with Tesco. Then, more importantly, if you
7 look in relation to implementation, we have done an analysis to show that the
8 implementation was generally less than Tesco had been saying that its implementation was.
9 So, *prima facie*, one would have said there is simply no basis for a case, if the OFT has
10 looked at Tesco and used, say, 50 per cent as the benchmark, then they ought to have been
11 taking the same approach to the other retailers and saying that there is not any basis for a
12 case.
13 We say this is all highly significant, particularly where we are the other parties to the Tesco
14 arrangement. It is, we would suggest, extremely odd, the suggestion that the OFT does not
15 have to explain to ITL why the arrangements that it has reached with Tesco are non-
16 infringing but at the same time does have to give its explanation as to why the arrangements
17 with the other retailers are infringing. We say that is what is distinguishes ITL's position in
18 particular, that it is entitled to understand the basis on which the OFT has selected out
19 different retailers and said that ITL's arrangements with some are satisfactory and with
20 others are not.
21 THE CHAIRMAN: To what extent is the Tribunal bound by the OFT's assessment of what it
22 needs in order to establish the infringement? Just taking your point about the adherence
23 policy, suppose it is established that the OFT had set itself a rule that unless it could
24 establish adherence in more than 50 per cent of cases it was not going to pursue an
25 infringement, and then it concluded that Tesco fell below that threshold and it concluded
26 that another retailer fell above that threshold. The Tribunal might come to the view that
27 actually it does not need to show adherence at all when you are looking at an object
28 infringement, or that adherence is a matter of whether people have complied with the
29 agreement, not a matter of whether the agreement existed at all. Are we entitled to take that
30 view or are we stuck somehow with the view that the OFT took that it was going to regard
31 at least 50 per cent adherence as a threshold for coming to a conclusion of infringement?
32 MR. HOWARD: I think the answer is that it all rather depends upon what the reasoning was of
33 the OFT in order for one to then see what is its significance. If you say to me, which I think
34 in part is the question, "We are hearing this as an appeal on the merits, effectively it is a
35 complete re-hearing, and what the OFT's view was over adherence may be neither here nor

1 there", if one puts it in those abstract terms that is right, so the fact that the OFT has said 50
2 per cent adherence is the relevant benchmark, the Tribunal can say, "We do not necessarily
3 agree with that". I accept that. In determining what is the relevant benchmark, you will be,
4 or you may be, influenced by the approach that the OFT and its internal experts, what
5 approach they have taken. One has to be very careful at this stage not to confuse two
6 different things: disclosure, which is disclosure of documents which may, in this case, go to
7 assist a party in putting his case, and documents which ultimately may prove a point.
8 If one says, "Does the OFT's internal cogitation and deliberation ultimately prove what we
9 wish to prove?" the answer is that it may or it may not. One would have to see what it is. If
10 you ask, "Are these documents that may assist us and the other retailers in proving their
11 case?" it may well do, and that is what we suggest is the test you should be looking at. It
12 does not have to be conclusive proof or even necessarily admissible evidence, but it may go
13 some way to assisting us in proving our case. In a situation such as this, particularly if you
14 look at ITL's position, where it faces an unfortunate, as it were, conundrum of trying to
15 understand the basis on which the public authority is acting saying, on the one hand, "Your
16 conduct with these other retailers is an infringement, yet it is not with Tesco", when we
17 cannot see what the basis is of the distinction. I would suggest that we must be entitled to
18 see that. Obviously we are not in judicial review here. As you have said, that gives rise to
19 different issues. We are, I would suggest, entitled in conducting our appeal to have a proper
20 understanding of the basis upon which our conduct is being criticised in one area but not in
21 another when we say there are no material distinctions to be drawn.
22 THE CHAIRMAN: I think my concern is that we do not want to have some kind of satellite
23 litigation taking place which deals with either whether or not Tesco was a party to an
24 infringement or whether the OFT acted reasonably in dropping the case against Tesco.
25 Neither of those issues seems to us to be raised by these appeals. Our concern, I think, is
26 that if we go down this route there is a risk of those issues creeping in to this appeal, and
27 there are already enough issues in this appeal without adding to them.
28 MR. HOWARD: I would respectfully suggest that the way in which one deals with that, and
29 particularly in the light of what you have said it may not be necessary to go any further,
30 alternatively, one gives a direction that the disclosure is being given because it is limited to
31 the issues that have been raised by the appeals and particularly in the circumstances why it
32 is relevant for us at least to be able to see these documents, but making it clear that you do
33 not expect the parties to conduct the sort of satellite litigation that you were suggesting. I
34 would respectfully say that it is not actually going to be helpful to conduct that satellite
35 litigation. I very much doubt that any of the appellants are actually going to wish to do that,

1 because, as Mr. Saini said, the point that we make is that the decision about Tesco is
2 entirely right. What we are saying is that we want to be able to go beyond the rather
3 superficial analysis and to actually see what it as that the OFT were saying so that we can
4 explain to the Tribunal fairly and properly that there is not actually any material distinction.
5 We are not, as it were, challenging the Tesco decision, we are challenging the decision
6 against us, and one of the grounds is that we say Tesco was rightly decided. Therefore, you
7 ought to be coming to the same conclusion. Even if the OFT wishes to distinguish the two,
8 you ought to be concluding that there is nothing in the case and that the approach taken to
9 Tesco was right.
10 THE CHAIRMAN: Thank you very much, Mr. Howard. Anybody else want to be heard on this
11 point before I call on Mr. Lasok? Mr. Lasok?
12 MR. LASOK: Madam, in our submission, it is important to bear in mind what these applications
13 are for. All the applications are for the documents evidencing the OFT's reasons, and I
14 emphasise the word "reasons" , for dropping Tesco. In addition, of course, there is an
15 application for disclosure of correspondence with Tesco. So the question before the
16 Tribunal is whether or not the Tribunal should order disclosure of either category of
17 document.
18 Just pausing there for a moment, I think Mr. Saini may have misunderstood what I said
19 earlier this morning. I did not intend to be taken to mean that the OFT was going to
20 disclose its own internal papers and stuff like that. When I referred to the confidentiality of
21 various documents, I was referring to documents that the OFT had already agreed in
22 principle to disclose, but it was concerned about certain aspects that were confidential to
23 third parties, and that is a different group of documents from the ones we are talking about
24 now.
25 On what basis ----
26 THE CHAIRMAN: Can you just clarify the position. I think what caused people to prick up their
27 ears was that you said you were going to disclose the file. There are a number of categories
28 of documents that we have been considering which people are not quite clear whether they
29 are on the file or not.
30 MR. LASOK: The stuff that is the subject matter of the applications that I am now dealing with
31 was not encompassed in what I said earlier this morning.
32 THE CHAIRMAN: Clearly the internal decision, the internal documents referred to are not on
33 the file, are you saying the correspondence between the OFT and Tesco in the run-up to the
34 decision is also not on the file?
35 MR. LASOK: It is not going to be.

1 THE CHAIRMAN: The documents to which I was referring, and to which I think Dr. Scott was
2 referring, are the raw material evidence as between, say, ITL and Gallaher and Tesco,
3 evidence that was presumably weighed up by the OFT when deciding whether to proceed, is
4 that on the file?
5 MR. LASOK: Disclosure in the form of access to the file was given to the parties in relation to
6 the material cited in the statement of objections in the form of CD rom, and also the parties
7 had access to non-confidential versions of the parties' written submissions which included
8 the written submissions made by Tesco. So there already has been disclosure of raw
9 material, the evidence. What we are here talking about is documentation that contains the
10 OFT's evaluation of evidence relating to Tesco, and of course correspondence with Tesco
11 running up to and at the time of the decision to drop Tesco. Therefore, it is correspondence
12 that does not include documentation that directly evidences an infringement or a non-
13 infringement or whatever, because it is not contemporary. It is correspondence that was
14 brought into existence in the course of the ongoing communications between the OFT and
15 Tesco.
16 THE CHAIRMAN: Just to be clear for the Tribunal's sake, the contemporaneous material which,
17 as you say, is the evidence of infringement or non-infringement which the OFT evaluated,
18 that has been disclosed?
19 MR. LASOK: I am now going to turn round and see whether or not I get nods. Yes, I have
20 received nods; I think that that is the answer to the Tribunal's question.
21 THE CHAIRMAN: Just so that we know where we are.
22 MR. LASOK: In our submission, it is quite important to identify the subject matter of the
23 application for what it is, because it is only when one has done that that one can see whether
24 or not this is an application for the disclosure of the relevant material. I use the word
25 "material", because it is a rather neutral word.
26 In our submission, it is, in fact, quite obvious that this is a fishing expedition that has
27 nothing to do with any issue in this case. What are the issues in this case? They can only
28 be issues essentially of a legal nature – lack of evidence, insufficient evidence, is effectively
29 a legal argument – going to the validity of the decisions challenged in these proceedings.
30 The decisions in question take the form of a single document addressed to, amongst others,
31 the various appellants. Effectively what you have is – at least the way the Court of First
32 Instance in Luxembourg would put it – a bundle of decisions. One does not need to say
33 whether it is a bundle of individual decisions or just one decision. These are all decisions of
34 a particular sort finding the existence of an infringement of the Chapter I prohibition and
35 addressed to particular companies. Certain of those companies then bring an appeal and

1 they assert that those decisions are wrong – wrong in law essentially. They marshal
2 arguments that can be divided into three parts. You have got legal arguments, you have got
3 arguments as to the facts and the evidence, and you have got what you could describe as
4 “evaluatory” arguments. Those are the ones I am going to focus on for the moment.
5 The main thing about the documents of which production is sought is that they are not
6 concerned with matters of law. Matters of law are argued by reference to legal submissions
7 and citation of authorities and not by digging around in other people’s files.
8 Arguments relating to matters of fact and evidence are advanced by reference to the facts
9 and the evidence. What you do is you draw attention to particular documents that are
10 contemporary or otherwise evidence a matter that is at issue. For example, you may have a
11 sequence of documents that are said to evidence an agreement – that kind of thing. You
12 look at the documents, you look at the witnesses and see what they have to say.
13 The other stuff that one sees intellectually in a decision is evaluatory material. It is
14 reasoning in the true situation. It is the situation that arises where the decision maker looks
15 at the raw material, addresses itself to matters of law and constructs an argument, a series of
16 reasons, designed to lead to a conclusion.
17 The problem about the process in which the Tribunal is engaged is that this is an appeal on
18 the merits. The Tribunal will decide this case after having properly addressed the matters of
19 law that are relevant to this case and after having looked at the evidence put before it and,
20 most importantly, the Tribunal will draw inferences and enter into a process of reasoning.
21 That process is the Tribunal’s process. The Tribunal will obviously listen to what the
22 parties have to say. What the parties put to the Tribunal in relation to reasoning is
23 submission.
24 What we have here is an application for the disclosure of material that is acknowledged to
25 form part of reasoning. It is not material that constitutes evidence, documentary or
26 otherwise, of the facts of the case; it is material (it may contain legal reasoning) is that it is
27 reasoning material. That is what is sought.
28 With all due respect to those behind me, when matters come before the Tribunal the OFT’s
29 reasoning becomes of historic interest, if it is of any interest at all. What is important to the
30 Tribunal is the facts, the evidence, the law, and the Tribunal must create its own reasoning
31 to justify the conclusion to which it comes. The reasoning adopted by the OFT is
32 submission, if it is made at all.
33 In this particular case, the further oddity is that not merely are we looking at something that
34 is just reasoning, it also does not concern the decisions under appeal, because the reasoning
35 is reasoning that relates to a decision that has not been made in relation to Tesco. That is

1 doubly irrelevant for legal purposes. It is doubly irrelevant because not merely are these
2 documents documents that relate to reasoning, and the reasoning of the OFT is not relevant
3 at this stage otherwise than by way of submission to the Tribunal, but it is reasoning that
4 was directed to the evidence in the Tesco case.
5 It is trite law that in that type of situation a Tribunal with the jurisdiction that this Tribunal
6 has got simply does not bother with material of that sort. That is why, for example, in the
7 *JFE Engineering* case, which is one of the Court of First Instance decisions cited in the
8 OFT's letter that the Tribunal has seen and which the parties have seen, the Court of First
9 Instance pointed out that there was simply no obligation even to give reasons because it
10 pointed out that the decision that it, the Court of First Instance, is concerned with is a
11 decision regarding whether one or more undertakings of infringed Article 81 or 101 or
12 however it has been renumbered – every time one closes one's eyes there is a renumbering
13 exercise that goes on - has been breached. The reasoning relating to a decision that is
14 simply not before the Court of First Instance in so far as it concerns third parties to the
15 proceedings is just not relevant.
16 In the *JFE Engineering* case the situation was a bit more precise than that because the
17 complaint was made that no reasons have been as to why certain people have not been
18 pursued. That was irrelevant.
19 The other cases, and there are quite a number of them, all tend to be Court of First Instance
20 cases with the odd Court of Justice case, like *Wood Pulp*, evidence the kind of approach that
21 is taken in virtually every single kind of circumstance in which one can envisage making a
22 complaint of this nature whether it is relating to prioritisation decisions, to fixing of the
23 penalty, which I accept is not the point that is being raised at this juncture, or to, in a case
24 like *JFE Engineering*, the argument that if you have got somebody that you are targeting
25 and you, the decision maker, do not make a decision addressed to them, you have got to
26 give the reasons to explain why.
27 None of these situations are at all relevant or can possibly be relevant to the matter in
28 question that is before the Tribunal. That is why these decisions are transposable to the
29 present circumstances, because here the Tribunal looks at the decision that is under appeal:
30 what is that decision? It is a finding of an infringement. The Tribunal then looks at the
31 evidence and the law relating to that case. It is not concerned with the position regarding
32 somebody else.
33 THE CHAIRMAN: What then do we go forward with as the fact in relation to Tesco's conduct in
34 this market over the period? Tesco was a key player in this market. Presumably how it
35 behaved may be relevant as part of the factual background. It may be a lot more relevant

1 than that, depending on how the cases are argued. Where are we with regard to what the
2 OFT says about Tesco? You said there is no decision here. Are you saying that there was
3 no non-infringement decision, there was just no decision at all, or do we assume for the
4 purposes of the proceedings that Tesco was not infringing the competition provision, or can
5 we not make that assumption?
6 MR. LASOK: There is no decision before the Tribunal so far as Tesco is concerned, because a
7 decision that comes before the Tribunal over which the Tribunal has jurisdiction is the one
8 that is the subject of a notice of appeal. Nobody thus far is contesting the decision of the
9 OFT which took the form of dropping Tesco, not making an infringement decision against
10 it, because the OFT took the view that it lacked the evidence.
11 THE CHAIRMAN: Yes. I am not sure that quite answers my question though, which is what in
12 the factual matrix against which we have to assess the evidence of an infringement in
13 relation to these appellants, what do we know about Tesco in that factual matrix?
14 MR. LASOK: The disclosure application is not directed to that at all. The disclosure is not about
15 the facts concerned with Tesco, it is about the reasoning of the OFT. As I pointed out
16 earlier, in truth, the documentation relating to Tesco, the facts, the evidence, concerning the
17 situation at the material times has been made available. In addition, of course, what has
18 been available is Tesco's own commentary on the evidence in the form of the non-
19 confidential version of the Tesco written submissions. With all due respect, I respectfully
20 agree the Tribunal, the factual matrix concerning the infringement is something that the
21 Tribunal must look at and it must decide what aspects of the factual matrix are relevant,
22 what are not, what are important or not important, but this exercise is not concerned with
23 that at all. It is just concerned with extracting internal documents that effectively amount to
24 the OFT's evaluation of evidence, putting it at its highest. As I pointed out earlier, the
25 OFT's evaluation is, if it is put to the Tribunal, a matter of submission. Beyond that it is
26 nothing.
27 DR. SCOTT: I think what we appear to be hearing is an expectation that there will be OFT
28 personnel in the witness box, and it will be put to them that they took one decision, an
29 effective decision, in relation to Tesco, and decisions in relation to other people which were
30 inconsistent. It will then be put to them that they should explain the nature of their
31 reasoning. We may come to whether that is admissible later on, but I think partly what is
32 being put to you, Mr. Lasok, is that it would short-circuit a lot of that if, before anybody
33 goes into the witness box, counsel for the appellant had the opportunity of understanding the
34 reasoning that is recorded in the two documents that we are discussing.

1 I think we do draw a distinction between the factual matrix and these documents, but how
2 do you respond to the request that people be allowed to see these two documents before any
3 witnesses go into the witness box?
4 MR. LASOK: I have to say that in my career I have never encountered a situation in which, in
5 proceedings of the nature of the current proceedings, the decision maker would ever
6 produce one of its own officers in order to give evidence as to the process that was
7 followed.
8 I say that, there is one case I think in which something like that happened, and that is the
9 well known *Italian Flat Glass* case in front of the Court of First Instance in which the
10 Commission was found to have tampered with a document, and an explanation was asked of
11 the Commission. That is quite a different matter and, as far as I understand it, we are not in
12 that area.
13 If you are asking whether or not a pure process question would give rise to the cross-
14 examination of an officer of the OFT, then I simply fail to understand how that is remotely
15 possible in these proceedings. These proceedings are not concerned with process. They are
16 concerned with how the OFT reached a decision, they are concerned with whether or not the
17 decision contested before the Tribunal is sustainable based by reference to the law properly
18 understood, the facts and the evidence. In our submission, that is it. One should not expand
19 the scope of the proceedings to involve matters of discretion and evaluation made by the
20 original decision maker when, at this juncture, or in these proceedings in relation to the
21 liability question, what is critical is the Tribunal's own evaluation of the facts and the
22 evidence and its conclusions as to the law.
23 THE CHAIRMAN: To what extent in relation to the points that Mr. Saini made that, for
24 example, they are going to want to put to your witnesses something along the lines of,
25 "Well, you rely on this overall pricing strategy of ITL for retailers and yet we know that
26 Tesco were not involved in this overall pricing strategy, so how can you maintain that there
27 was an overall pricing strategy which did not include the market leader?" I do not know,
28 and you may not know either, whether the OFT witnesses respond to that by accepting the
29 assumption that Tesco was not involved or by saying, "We are agnostic as to whether Tesco
30 was involved, that was something that the Tribunal has to draw its own conclusion about".
31 It is answering those sorts of questions and similarly the question about, well, if the
32 existence of some agreements helps establish the existence of a particular agreement, does
33 the non-existence of the Tesco agreement then undermine that? Are we bound to get into
34 the question of the OFT's evaluation of the Tesco facts in answering those sorts of
35 questions?

1 MR. LASOK: In our submission, no, the OFT's evaluation of the facts is a historical event, but it
2 is not relevant to the issues of fact and law that are before the Tribunal. More particularly,
3 if one says, for example, that ITL had a general policy to rope in as many retailers as
4 possible to give effect to its strategy in relation to retail pricing, that does not exclude the
5 possibility that one or more retailers just did not comply.
6 The fact that, for example, ITL wanted to get everybody to sign up to evil and unlawful
7 practices does not mean to say that it was successful in every event. This is just one of
8 those situations in which the OFT for its part evaluated the evidence and came to certain
9 conclusions, but it came to the conclusion that it did not have sufficient evidence. As I have
10 submitted, when you move now to the stage that is before the Tribunal, the Tribunal has got
11 to look at the evidence – and of course the law, but more particularly focus on the evidence
12 – that relates to the appellants. Nobody is saying that the Tribunal should close its mind to
13 the evidence relating to Tesco. We are not saying that, but what we are saying is that the
14 OFT's reasoning in relation to Tesco is of no relevance whatsoever.
15 The position on this is well established. It is trite law, certainly so far as the European
16 courts are concerned. What they are doing is not applying some weird and strange funny
17 Continental approach to the administration of justice, they are just applying basic principles
18 of commonsense and general principles of law regarding how you analyse decisions that are
19 challenged before you and how you sort out what is legally relevant and what is not legally
20 relevant.
21 Unless there is anything further that I can assist the Tribunal with, those are our submissions
22 unless somebody tells me I have got something else to say. Thank you.
23 MR. SAINI: If I can very briefly reply, madam?
24 THE CHAIRMAN: Yes.
25 MR. SAINI: If I can, first of all, disagree very strongly with the submission that Mr. Lasok has
26 made about evaluation. In our submission, the evaluation of the evidence by the OFT will
27 be a primary focus of the submissions and evidence in this case because it is that evaluation
28 that we are challenging in the notice of appeal. He would have it that that is just a matter of
29 submission and one can effectively forget the OFT's evaluation. The OFT's case is built
30 upon a certain theory of harm. That is its evaluation. That is going to be the primary focus
31 in this case.
32 This is also not a point, the whole Tesco issue, which we have started running in our notice
33 of appeal without any encouragement effectively from the OFT. I am not sure if you have it
34 to hand, but if you go to the OFT's decision, which is why we are all here, and this is the
35 document that is being challenged, the 15 April 2010 decision, the OFT there in three

1 paragraphs explain, was there a need to do this, they have decided to explain in a decision
2 addressed to my clients and others why they decided to drop the case against Tesco. They
3 refer expressly in 2.120 to a review, and we know that the review led to at least those two
4 documents. This document contains the decision we are challenging. We have responded
5 in our notice of appeal in so far as we can presently to why we consider it was a rather odd
6 position that was taken. Therefore, this is not something of our own making. The OFT
7 themselves decided they had to explain the decision in relation to Tesco.
8 THE CHAIRMAN: The question is whether that is a decision which is subject to this appeal?
9 MR. SAINI: Certainly not, it is not the subject of this appeal. What is inevitably going to be the
10 subject of this appeal are the evaluations made by the OFT in deciding to pursue the case
11 against my clients based on a certain matter, and to not pursue the case against Tesco based
12 on what we consider were the same materials. That is definitely going to be a centre part of
13 this case. That is why it is not a fishing expedition. A fishing expedition is classically an
14 application for disclosure where one cannot identify by reference to the pleadings the
15 relevance of the documents being sought. There is no dispute that as far as our concern is
16 concerned, and Mr. Lasok has not disputed this, we consider these to be the relevant
17 documents. It is premature for the Tribunal to say they are not relevant because ultimately
18 we do not consider your legal points will be right. That is a matter for another day. That is
19 why I made the distinction in my opening submissions between relevance and whether or
20 not the legal points we are making ultimately will succeed. That issue is for the ultimate
21 decision of the Tribunal.
22 We do not accept the threshold point made by Mr. Lasok, which is that issues of evaluation
23 are relevant. This Tribunal has made clear in the *Napp* case that in fact the focus for the
24 Tribunal will be upon the OFT's decision. That includes not just the conclusions but all of
25 the evaluation. That is what we are going to be arguing about. That was said in the light of
26 there being an attempt to introduce material extraneous to a decision to justify a decision on
27 infringement. Here we are confining ourselves to the OFT's decision and our response to
28 that decision.
29 Can I also deal with one other point which was raised with Mr. Howard, which is how does
30 one keep this issue in control. There is a very easy answer to that. At this stage we are
31 seeking disclosure of those documents to see if we need to amend our notice of appeal. We
32 will need to get permission from this Tribunal to amend our notice of appeal. If there is any
33 chance of us in that amendment creating a side show or a kind of satellite litigation, then no
34 doubt this Tribunal will stop us. There is going to be another stage. If we obtain these
35 documents we will have to come back to the Tribunal and the Tribunal will have to then

1 decide whether the case as we formulate it is one which is appropriate to go before the
2 Tribunal. The Tribunal should not be concerned when deciding the issue of disclosure
3 about some satellite litigation, because the Tribunal has the ability to prevent that happening
4 when it decides whether or not to give permission to amend.
5 Can I just finally emphasise the point, which is that we do know that in a year's time these
6 witnesses will be cross-examined about these issues. It will be regrettable in the extreme if
7 we are having to make disclosure applications at that stage. It may be that the documents
8 produced show there is not any point and there is a perfectly legitimate reason for Tesco
9 having been dropped, in which case the issue can disappear, but unless and until we get
10 those documents we will never know that.
11 I have nothing further to add in reply, madam.
12 THE CHAIRMAN: What you are envisaging happening is that you will question an OFT witness
13 as to why Tesco was dropped and they will give an answer and then you will be able to
14 point to the contemporaneous documents which, if we grant disclosure, and say, "That is
15 not what you said at the time", and the person will say, "Yes, it is", or, "I have changed my
16 mind", or whatever. How would us resolving an issue that arises as to whether the reason
17 given now is a good reason or a bad reason or a different reason from the reason suggested
18 in the paper put up to Mr. Williams, how is the resolution of that kind of issue going to help
19 us decide whether your client was guilty of an infringement?
20 MR. SAINI: Because we will submit that the theory of harm which is in the decision that we are
21 challenging – we are definitely challenging the theory of harm – is an unsound one. That
22 theory of harm, if was a sound one, applies equally to Tesco.
23 Can I also make one point clear: as I have understood the position – I do not know if they
24 have made their mind up yet – are the OFT proposing to call witnesses in relation to the
25 finding of an infringement? One does not know at this stage. I do want to emphasise that I
26 do not think anyone on the appellants' side doubt that attempts will be made at least to ask
27 questions on those issues. Ideally, if and when a witness is called, he will exhibit to his
28 statement the two papers. What we are doing at this stage is trying to obtain access to those
29 papers to decide if there is any case at all that we can make in relation to this issue.
30 Can I make one final point, and this a point as to the clarification that Mr. Lasok gave: we
31 do then pursue our application. Given that the file that he is going to produce to us is not
32 going to include Tesco correspondence, we do pursue that application.
33 THE CHAIRMAN: Yes. Mr. Howard, do ----
34 MR. FLYNN: I am not claiming any precedence, simply to repeat the pattern of before and to be
35 equally short. Madam, in this case a major issue in the appeal is the OFT's legal

1 characterisation of the facts as an object infringement, and part of our case is that we do not
2 understand this theory, it is very puzzling, novel and obscure, and if you add in the Tesco
3 factor, if you like, it is all the more obscure. For that reason, as I said before, I think it is
4 important for the Tribunal to be fully aware of the OFT's reasons for dropping the case
5 against Tesco, and that is what this application is about. It may go to examination of an
6 OFT witness. In my submission, it is more likely to be part of the way we develop the case
7 in front of you. This is not necessarily a matter of, "You have changed your mind", or,
8 "You did something silly at the time", it is simply to have the facts in which to explain our
9 argument as to why the theory does not stack up.
10 THE CHAIRMAN: Do you have anything to add, Mr. Howard?
11 MR. HOWARD: I just want to make two brief points. The first one is similar to a point made by
12 Mr. Saini, but it is particularly important when you look at Tesco's appeal. Section 5 of our
13 appeal is based upon the decision in respect of Tesco and the conclusions that we draw from
14 that. There is no application to strike out section 5 of our notice of appeal, and Mr. Lasok
15 has not explained why the documents are not relevant. They clearly are. That is the first
16 point.
17 The second point in relation to Mr. Lasok's main submission, which, as I understand it, is
18 essentially, "You are not concerned with the process of evaluation of the OFT". That is, as
19 I think I made clear in opening, right as far as it goes in that ultimately you are not bound by
20 it. If you ask the question, "Are you informed by it?" the answer is rather different. We
21 suggest you are informed, particularly in this case, which you remember started as being
22 both an objects and effects infringement and has ended up purely as objects. That does
23 require one to really understand whether or not – and we would say there is a bright line test
24 – the arrangements here did fall clearly on the basis of having an anti-competitive object,
25 and we say they did not. In reaching that conclusion, we believe the Tribunal will be
26 assisted by understanding the basis on which the OFT did, in fact, evaluate things. You
27 may come to a different view, but it will be assisted, and certainly ITL is assisted in
28 presenting its case, in being able to show that the reasoning in respect of Tesco applies *a*
29 *fortiori* in relation to the other retailers.
30 THE CHAIRMAN: Thank you very much. We will break now for the short adjournment, and
31 when we come back we will deal with the other disclosure point in relation to the data
32 underlying the experts' reports. I gather this is not now simply an ITL/OFT issue but relates
33 to the other parties as well. It may or may not be helpful for me just to indicate where the
34 Tribunal is currently at in its thinking about this, which is that we think it is difficult for a
35 party to rely on an expert report without being prepared to disclose the underlying data, but

1 at the moment we do not see why that data needs to be disclosed to the whole
2 confidentiality club. There should perhaps be bilateral disclosure of the data to the OFT and
3 its experts rather than more widely than that. Perhaps the parties can consider over the short
4 adjournment whether there is a way forward based on that very preliminary view.
5 We will meet at five past two.
6 (Adjourned for a short time)
7 THE CHAIRMAN: On the question of the Tesco disclosure, we do not plan to give a ruling
8 today, we will give a short written ruling in due course. So let us then move on to the final,
9 I think, issue for today, which is the disclosure of the underlying data in the appellants'
10 expert reports. Mr. Lasok, are you going to begin?
11 MR. LASOK: I think the Tribunal knows what the issue is. We have made requests for
12 disclosure of underlying data. As I understand it from the responses from the appellants
13 concerned they accept in principle that the material is disclosable. There was some question
14 about the use that was going to be made of the data, but as the Tribunal well understands the
15 purpose for which the underlying data was sought was actually set out by the OFT in the
16 letters requesting the data. Were the OFT to go beyond what it is permitted to do I am sure
17 that the Tribunal would spot that with or without the assistance of the appellants and ensure
18 that everything went back on track. So in our respectful submission it would be appropriate
19 to make a direction for, as the Tribunal put it before lunch, bilateral disclosure. On the
20 question of multilateral disclosure that is really not a question for the OFT, we would
21 submit it is for the other appellants. I can say this, at the lunchtime break Mr. Kennelly, for
22 Shell, buttonholed me – he is not here – and told me that I could inform the Tribunal that
23 Shell was not interested in seeing anybody else's data.
24 THE CHAIRMAN: Can you just help me from which parties you are seeking disclosure? Or is it
25 in relation to particular reports?
26 MR. LASOK: Yes, disclosure was sought from ITL by a letter dated 17th September 2010, which
27 specified the data in question and I think there was a later letter which qualified that
28 application. Data was also sought from the Co-operative Group by a letter dated 17th
29 September 2010, and again it specified with particularity the precise nature of the data
30 requested.
31 By a letter of the same date a request for data was directed to Asda and again it specified
32 with particularity the data that was requested, and a request was made by a letter again of
33 17th September 2010 of underlying data from Morrison and Safeway, and I think that is all
34 the requests that were made. I should say that we received responses from the appellants in
35 which they accepted that in principle the OFT was entitled to disclosure, but they made

1 certain objections of a different nature relating, as I have said, to such things as the use to
2 which the disclosed material would be put, which I have already explained. Those
3 responses were in a letter from Asda dated 1st October, a letter from ITL dated 7th October,
4 a letter from Morrison, Safeway, dated 8th October, and a letter from the Co-op dated 1st
5 October.

6 THE CHAIRMAN: As far as who within the OFT needs to see this, presumably it is both OFT
7 officials and external ----

8 MR. LASOK: Quite so.

9 THE CHAIRMAN: Yes.

10 MR. LASOK: The external experts would obviously be people who were within the
11 confidentiality ring.

12 THE CHAIRMAN: Right, well of ITL, Co-operative Group, Asda, Morrison, Safeway is there
13 anyone who objects to the Tribunal making an order directing the disclosure to the OFT and
14 the external experts who are within the confidentiality ring of the documents requested in
15 those letters of 17th September of this year or anybody who wants to be heard as to the
16 propriety of making such an order?

17 MR. HOWARD: We have one issue which relates in part to the way the request is put in that we
18 say that some of the documents that are being sought are not relevant. We also have
19 concerns about the identity of the persons who whom disclosure should take place, i.e.
20 within the OFT it should essentially be a named group of individuals because this is highly
21 sensitive material and we are concerned about material essentially being available across the
22 board from the OFT.

23 Thirdly, as Mr. Lasok has mentioned, we do have a concern about the use which the OFT is
24 entitled to make of the information. It may be that there is a large measure of common
25 ground about that, but we do believe it is important in the light of the history of this matter
26 to be absolutely clear as to what the OFT is entitled to do with the data – at least without
27 permission of the Tribunal.

28 THE CHAIRMAN: And how would you bound that use that they are able to make of it?

29 MR. HOWARD: We would suggest that the Tribunal directs at this stage that they are entitled to
30 disclosure of the information for the purposes of testing and checking the expert reports
31 which have been put forward by the appellants, but not for the purposes of expanding or
32 elaborating on the reasons, and if they sought to do that they would have to get the
33 permission of the Tribunal.

34 THE CHAIRMAN: Expanding or elaborating ----

35 MR. HOWARD: -- on the reasons.

1 THE CHAIRMAN: And the relevance point, the first point that you made?
2 MR. HOWARD: The relevance point I cannot explain without taking you to the correspondence
3 and then the report. I will explain it first in general terms, that may be sufficient. The
4 report to which reference has been made is a report of Mr. Haberman of Ernst & Young
5 and Mr. Haberman refers to a database system which has within the database an enormous
6 number of documents, it is over 700,000 records, and some 32 million individual price
7 observations. Other than that he refers to the fact that there is such a database his report is
8 not actually based upon that database, but on a subset of it, which he has set out and the
9 material which he has then extracted. We have no difficulty with the idea that the OFT or
10 their experts should be entitled to see the data on which Mr. Haberman has relied. What we
11 say they should not be entitled to disclosure of is the vast universe of data on which our
12 experts are not relying because that would not be appropriate; simply we say that is not
13 relevant.
14 For instance, our database, the dates that we rely on go between 2000 and 2007, whereas the
15 larger database to which Mr. Haberman has referred, goes up to 2009. We say there is no
16 reason that they need to be looking at data after 2007 – that is one point. The other point is
17 that what the experts have done is to look at the significant brands of cigarettes, which
18 account for 90 per cent of Imperial's UK cigarette sales, and they have limited their
19 evaluation to that 90 per cent. We say it is not necessary therefore to look (a) at the balance
20 of 10 per cent, or (b) other things which do not fall within the cigarette sales, they are just
21 not part of our report and it would be inappropriate to the OFT to be given disclosure of
22 material which was not relevant to the points being made by our experts. That is the
23 relevance point.
24 THE CHAIRMAN: Yes, there is an important difference when one is looking at disclosure in
25 litigation, between documents on which your experts have relied and documents which are
26 relevant to the points your documents make because disclosure usually covers material that
27 they could rely on which your experts have not relied on because it undermines the
28 conclusions that they might arrive at. But, is it possible to delineate for the terms of an
29 order documents of a slightly wider class than those relied on but those which are also
30 relevant to the findings but which does not extend to ones which could possibly be relevant
31 either to supporting or contradicting what your experts say. Do you see the ----
32 MR. HOWARD: I do, but if we take, for instance, the timing point, all that has happened is that a
33 decision was made "We have to stop somewhere", and they stopped three years after the
34 alleged infringements, they have gone up to 2007, and we say it is disproportionate and
35 unnecessary for the OFT to say: "We want to look at data going beyond that". It is true

1 there was a database that went up to 2009, but they could increase and say: "Well, we have
2 that, we would like to go up to 2010, because we are now that much further advanced", and
3 we say: "Bearing in mind what you are looking at, which is looking at alleged infringing
4 activity which came to an end in 2003/04"; insofar as one is seeking to look at the data
5 across a time spectrum we say there is a point at which, just as a matter of commonsense,
6 one has to stop and 2007, we would say, is beyond that, or certainly it is the latest date you
7 need to go. Equally, the selection that has been made is simply to say it is sensible to look
8 at 90 per cent of the main brands, and 90 per cent of the cigarette sales, because if one looks
9 at everything it is just a much more detailed exercise.
10 Of course, their experts could criticise that and say: "No, that was not a sufficient sample."
11 We say is they should only be doing a critique of our experts, not setting up some
12 alternative theory. That really comes back to the use to which they are entitled to make of
13 this material. We are not in conventional litigation where each side, as it were, is entitled to
14 call their experts to prove their point. The OFT is constrained by the case law and they are
15 not entitled to elaborate or expand on their decision, and that is why we say insofar as they
16 are calling experts in response to ITL's experts they can respond to what we have said and
17 test the methodology, and do a critique based upon what our experts have said, but they
18 should not be putting forward some alternative basis to justify their decision through their
19 experts, that is why we say it is fairly limited.
20 DR. SCOTT: Am I right in thinking that the 10 per cent includes brands which are the subject of
21 the decision?
22 MR. HOWARD: The answer to that would be "yes", because the decision covers the entirety of
23 the brands.
24 DR. SCOTT: Absolutely.
25 MR. HOWARD: For the purpose of the analysis what was being looked at, that is what one needs
26 to understand, was the adherence exercise, that is what the issue is that is being addressed,
27 and so they took 90 per cent, which are the six main brands to see to what extent were the
28 respective retailers allegedly adhering to the strategy.
29 THE CHAIRMAN: As far as the use restriction is concerned, and we will hear what Mr. Lasok
30 has to say in a moment, but I am concerned that we should not set qualification which is
31 either difficult for those who are looking at the material and some of whom are not going to
32 be lawyers, to operate under, and similarly difficult for the Tribunal to enforce. Now, what
33 you seem to be saying is the use to which it is put when the OFT come to present their case
34 to the Tribunal rather than a use which somehow is intended to operate on their experts or
35 employees when they are actually looking at the material?

1 MR. HOWARD: Our concern is that on 17th December we are going to get the defences of the OFT which will be accompanied by their expert reports, and we are concerned to find ourselves at that stage, some seven or eight years into these investigations, presented with a new expert case, and that is what we are concerned to stop. They had their opportunity during the investigation to require data, to put forward an economic theory and their economic case, and to rebut the economic case that we were putting forward through our experts at that stage.

They have done what they have done and we can see in their decision. What we are concerned about in responding to our expert report we do not find that we are having to meet a new case, and that is what we say should not happen. Whether one does that by a formal direction or by the Tribunal making it clear in accordance with the jurisprudence, that is not what they should be doing without permission, and therefore they can put in expert evidence and have this disclosure but it should be confined to rebutting our case rather than putting forward, as it were, a new case. That is our concern in practical terms.

15 THE CHAIRMAN: Yes, I understand that. Your third point about the identity of persons to whom it should be made available is a fairly self-explanatory point.

17 MR. HOWARD: Essentially that is a discrete point, but it simply comes down to this, in the confidentiality ring the parties and their solicitors and counsel identify the named individuals, and the OFT has not had to do that, but here we are dealing with highly confidential information. Once people have that information in their head it is very difficult to police what they do with it, particularly if they have left the OFT and go and work elsewhere. We are concerned that the individuals who are going to receive this information should be named, and we cannot really see why there is any difficulty with that.

Secondly, a further requirement we have asked for is that for a period of six months after they have received the information the experts and any individuals within the OFT should not be providing consultancy advice to others in the tobacco industry. We are concerned again, if they have this sensitive price information that, unwittingly perhaps, people can be giving advice to one of ITL's competitors, and the whole basis on which ITL prices its brands would come out, or equally they could be giving information to the retailers and we are obviously very concerned about that.

31 THE CHAIRMAN: Yes, thank you, Mr. Howard. Is there anyone from the other three recipients of these requests who wishes to say anything?

33 MR. SAINI: Can I just indicate on behalf of Morrison and Safeway, we share the concerns that Mr. Howard has expressed. We certainly would like some restriction on the use of the material and it can either be done by way of a formal order or an indication of ruling.

1 Equally, we would like a restriction on the dissemination of the information to a named set
2 of people, but we do not have any distinct point about relevance. Thank you.
3 MR. THOMPSON: We have taken essentially taken three points: (i) Insofar as data has been
4 used in the reports of Dr. Jenkins, that relies on ITL data we are obviously bound by our
5 relationship with ITL and so we have resisted producing information until this issue has
6 been resolved so far as ITL is concerned. (ii) We wanted some assurance as to
7 confidentiality. At the moment I think the experts are not formally within the
8 confidentiality ring, and I have heard what Mr. Howard and Mr. Saini have said about
9 identifying individuals at the OFT. There is also an issue about the application of the order,
10 it does not obviously apply to this category of data and so I think it is simply a formal
11 question of making it clear who is within the ring and what the category of data is, and to
12 ensure that it is within the scope of the order; and (iii) Simply in relation to our data, which
13 in principle we are happy to produce, is that it is quite difficult to disaggregate from the
14 ITL data, that the exercise that has been done has effectively melded CGL data and ITL
15 data together, and so until the ITL issue is resolved it is difficult for us to do anything. It
16 seems to us that we have been perfectly reasonable in relation to this and we simply want to
17 have a workable way forward which can be common to everybody, but obviously we will
18 do our bit insofar as it relates to the Co-operative Group. That is our position on this.
19 THE CHAIRMAN: You say that the OFT experts are not currently in the ----
20 MR. THOMPSON: I think a letter was written to the Tribunal on 11th October, I think that was
21 the first time. As of now I think it is simply seven members of Monckton Chambers are the
22 only people in the confidentiality ring, and I think there has been an application for another
23 two to be added plus some experts, but I do not think that has currently been resolved, so
24 that is something that could conveniently be done today. I think it is simply a matter of
25 tidying up the order to make sure that it does apply to data of this kind, so that there is no
26 doubt about it, whether by way of amendment to the order, or simply a direction that the
27 same approach should be adopted in relation to this data.
28 THE CHAIRMAN: Yes, thank you.
29 MR. FLYNN: Madam, just so you have the full set, the Asda position in correspondence has
30 been that we have no objection in principle to handing this over. We rather wanted to know
31 to what use it would be put. That indication has not been given in correspondence, nor by
32 Mr. Lasok now, but in common with Mr. Howard we would be content with an indication
33 from the Tribunal as to the appropriateness of the use of the data, and our suggestion was
34 that it should be ventilated at this CMC for that purpose. As far as the other restrictions on
35 use go I have nothing further to add.

1 THE CHAIRMAN: Thank you. Yes, Mr. Lasok?
2 MR. LASOK: If I take the points which appear to have been made in the following order:
3 relevance first, use second and then the identity of the persons benefiting from disclosure.
4 So far as relevance is concerned, we have no difficulty with the point made that the ITL
5 data go up to 2007 and it is not necessary to refer to more recent data. At the moment we
6 do not see a justification for any further restriction on the data set; that in large part is a
7 matter for the experts themselves and it would, in our submission, be inappropriate certainly
8 at this stage, to seek to impose some limit on the scope of the disclosure on the ground of
9 relevance when one is looking at data that does cover the relevant period, and that
10 ultimately is for experts to assess. It is difficult for people who are not experts to pontificate
11 at this stage as to what might or might not be relevant in the data set. When the experts look
12 at the data, when it is disclosed to them, they will be able to determine which bits of it are
13 relevant and which are not.
14 THE CHAIRMAN: Insofar as the reports only looked at the data which related to the six main
15 brands, and not the other 10 per cent, are you not therefore accepting that the data disclosed
16 to you should be limited to that 90 per cent?
17 MR. LASOK: As I understand it the other 10 per cent do include brands that are the subject of
18 the case.
19 THE CHAIRMAN: Well all brands were the subject ----
20 MR. LASOK: The difficulty is if you have an expert who has made a selection of data in order to
21 produce a report then in our submission the natural thing to do for an expert for the other
22 side is to look to see whether that selection is justified, and that may well cause that expert
23 to look at the material that has not been included in the set. The conclusion may well be
24 that the first expert has indeed done a good job but actually to verify is something that the
25 expert needs to do and in our submission it would be inappropriate to seek to curtail the
26 activity of the expert when verifying the material and conclusions drawn by the first expert.
27 THE CHAIRMAN: So you are saying you need to look at the whole pool and not just the
28 selection that was studied by the expert?
29 MR. LASOK: Quite so. So far as use is concerned, in our submission the intended use, which
30 has been communicated to the parties, is verification. There is a limitation on use and that
31 limitation is set out in the case law of this Tribunal. The limitation, although it covers such
32 thing as embroidering a decision in the sense of introducing new material in order to justify
33 it, does not preclude the OFT from using material to rebut a case made against it, and that is
34 the settled law of this Tribunal. But in our submission since the matter is covered by the
35 case law the best thing to do is to leave it there. Should it be the case that the OFT goes

1 beyond what it is permitted to do then there will be a case for intervention, and I am sure
2 that the parties will intervene, and the Tribunal can make a decision then. One of the
3 difficulties is that in terms of making an order the best and most accurate way of putting it
4 would be that the use to be made of the material must be only the use that is permitted in the
5 Tribunal's case law, but that does not really add anything. I am rather concerned about a
6 situation in which people have an *a priori* idea of what the Tribunal's case law actually says
7 and they seek to impose that in the form of a direction made by the Tribunal, when actually
8 the proper thing to do is to deal with cases as and when they arise because they can be dealt
9 with properly in that way, rather than straight jacketing in advance, because the risk with
10 straight jacketing in advance is that you actually distort the use that is made of the data. It
11 may well be that there is a permitted use that is prevented because of, perhaps, an over
12 zealous formulation of the gist of the Tribunal's case law in the form of a direction. That
13 should by no means be taken to indicate that the OFT is intending to use this material to
14 construct a completely different decision from the one that has been adopted. The only
15 point that I am making is that in the Tribunal's case law there is a line which has been set by
16 the Tribunal, we all know what it is, and we also know that the Tribunal will be vigilant to
17 ensure that that line is respected. For that reason, in our submission, there is no necessity
18 for a direction that seeks to summarise the existing case law.
19 On the third point, which is named persons, in our submission it is sufficient to restrict the
20 disclosure to the OFT and its external advisers who are within the confidentiality ring. In
21 our submission there is no justification for identifying named individuals within the OFT
22 who are the people who will benefit from this disclosure. One of the difficulties with a
23 department like the OFT is that the personnel involved in the case do tend to change from
24 time to time, so what you actually have is people coming in and going out. I think there
25 was a suggestion that there might be some danger of officers of the OFT leaving the OFT
26 and then spilling the beans on the confidential information that they have acquired in the
27 course of their employment by the OFT, but as I understand it there are restrictions – quite
28 proper restrictions – put in place to prevent that kind of thing happening and there is no
29 reason for an additional restriction, that would be superfluous.
30 THE CHAIRMAN: Are those statutory restrictions?
31 MR. LASOK: Can I just take instructions on that?
32 THE CHAIRMAN: Yes.
33 MR. LASOK: (After a pause): I am told that it is statutory and when somebody joins the OFT he
34 or she has to sign a document confirming acceptance of restrictions of that nature.

1 THE CHAIRMAN: As far as the external experts are concerned, I do see the point about there
2 perhaps needing to be some period in which they do not offer consultation to other
3 companies in this industry either given the length of the period over which this case is going
4 to span, and for some time after if they are going to be pouring over this data, is there some
5 restriction that we should be placing on them in relation to the work that they carry out
6 during and for a short time after the currency of this appeal?
7 MR. LASOK: There are two points about that, one of which, if one takes the ITL situation, is that
8 the ITL data on the basis of the points made on behalf of ITL, which I have accepted, that is
9 that the data in question will run up to 2007 because more recent stuff is not material that
10 we need to see. But there is a question as to why it is that data that only goes as far as 2007
11 would actually have the seriousness or importance that ITL attribute to it. The other point is
12 that obviously if there is a restriction of that nature then the assumption would be that all the
13 experts would be subject to the same restriction. So for example the external experts – I do
14 not know what the position is so far as ----
15 THE CHAIRMAN: You have not thus far contested the assertion made by the parties that this
16 information is highly confidential, and we are proceeding on that basis because it did not
17 seem to me that the OFT was contesting that. It seems from what the parties are saying that
18 this information has a degree of sensitivity as far as they are concerned which goes beyond
19 that information which is generally made available to the confidentiality ring, which is why
20 they wished to impose more stringent conditions on its disclosure and it did not appear to
21 me that the OFT disagreed with that, so I do not think that it automatically follows that if we
22 impose restrictions on those who are party to this information, those who see this
23 information, that we really have to impose those same restrictions on everybody. ITL's
24 experts will have seen this, it is up to them to negotiate with their experts what restrictions
25 they impose on their conduct during or after this appeal and we are only talking at the
26 moment about bilateral disclosure. This presents us with a difficulty. Your experts have
27 not been asked presumably whether they would be prepared to give that kind of undertaking
28 or accede to that kind of direction.
29 MR. LASOK: Can I just take it in stages, so far as the commercial or other confidentiality of this
30 information is concerned, it is obviously private information, it is not in the public domain.
31 As to whether or not any commercial confidentiality attaches to it, it is very difficult for us
32 to say. Normally one would say in relation to information of this sort, if it is old then the
33 likelihood of commercial confidentiality attaching to it is somewhat limited, and the case
34 might have to be made out for saying that it was commercially confidential. Now we have
35 not addressed that because no positive case has been put forward to demonstrate why it is

1 said to be confidential. I put that on one side because what I now want to turn to is this
2 question of the external experts.
3 If ITL in its contracts with its external experts, has agreed with them a restriction of a
4 particular sort then that is quite important, because in our position it would be difficult for
5 us to maintain that no similar restriction should not be imposed in relation to our experts,
6 but I do not know what the ITL position is. If one works on the assumption that the ITL
7 position is that their own external experts are subject to a restriction of the sort they are
8 talking about, that is a powerful submission to be made in support of the argument that the
9 same type of restriction should be imposed on other external experts who see this type of
10 material.
11 When I made my remarks a moment ago I was not suggesting that the Tribunal should go
12 around imposing restrictions left right and centre, the point that I was making was that each
13 expert is the same as every other expert. In other words, if there is a risk that an external
14 expert is going to come into knowledge of commercially useful information that they might
15 use intentionally or otherwise when advising in a particular sector then on the face of it, if
16 that is a material risk, then all experts would be dealt with in exactly the same way. So my
17 assumption is that when ITL have put this forward as a suggestion it reflects the terms that
18 they have themselves agreed with their own experts. But if the position is different, then
19 our position would equally be different. If, for example, in the agreements that they have
20 made with their own experts the restriction is, let us say, three months, then we do not see
21 how a restriction of six months in duration could be justified in relation to our external
22 experts. I am reminded that our experts are in any event subject to statutory obligations
23 under s.241 of the Enterprise Act and that has criminal consequences, it is s.241(3) and (4).
24 THE CHAIRMAN: It is not (3), is it? It is 241(1), 241(3) is an act dealing with disclosure to X
25 to assist X's statutory functions, whereas you are disclosing this to your expert to assist your
26 own, not your expert's statutory functions.
27 MR. LASOK: I am sorry, yes.
28 THE CHAIRMAN: Or I may be misreading it.
29 MR. LASOK: It is 241 (1) and (2) I think, actually. I do not think there is any additional point
30 because as I understand it the other parties effectively made similar points with the
31 exception of Mr. Thompson who queried whether the existing order dealing with the
32 confidentiality ring covered this type of information but obviously if it does not, it ought to.
33 THE CHAIRMAN: Yes.
34 MR. LASOK: Unless there is anything further, those are our submissions on that point.

1 DR. SCOTT: I suppose my question is probably for Mr. Howard, but it is this: As I understand
2 it, Mr. Lasok is making a concession that he only wants the information up to 2007.
3 MR. LASOK: Yes.
4 DR. SCOTT: And implicit in that is that the quantitative information will be somewhat dated. Is
5 the suggestion implicit in your remarks that the qualitative implication of that quantitative
6 data is actually still relevant in terms of its disclosure, a strategic approach taken by your
7 client?
8 MR. HOWARD: In short the answer is "yes", it remains highly confidential information. I have
9 not taken instructions precisely what it is, but of course it is not simply price sensitive today
10 but it relates to the whole basis on which ITL deals with different retailers and things of that
11 sort, and that would be information which ITL would not wish one retailer to have relating
12 to its dealings with another, it is utterly obvious, and it three years ago is not what was said,
13 we were talking about information going back 20 years, that might be rather different, but
14 three years ago is still effectively current.
15 DR. SCOTT: Yes, that is what I suspected.
16 MR. HOWARD: If I can just deal with one other point that Mr. Lasok raised which really I
17 would suggest is a non-point, which is the suggestion that the experts for the OFT should
18 only be put on the same terms as the experts for ITL. The reason it is a non-point is this,
19 ITL has a contractual arrangement with experts who it has selected, in other words, it feels
20 comfortable with them and is perfectly happy to deal with them on whatever terms it has
21 chosen. The experts who the OFT are instructing are not people with whom ITL has a
22 relationship of any sort whatsoever, and they are simply concerned to ensure that their
23 confidential information is protected, and the way that the Tribunal can ensure that an
24 adequate safeguard is put in place is by requiring – it is only individuals who have the
25 information – that they should not be consulting in the tobacco industry for a period, we
26 suggested, of six months which provides some protection to ensure that ITL's position is
27 not damaged.
28 THE CHAIRMAN: Six months starting from?
29 MR. HOWARD: It would be six months after the conclusion of the hearing that we would be
30 suggesting. What is being whispered behind me is it would be fairer to take it after the end
31 of any appeal process, because that is when the documents would be destroyed and no
32 longer, as it were, available to the experts.
33 THE CHAIRMAN: Yes, or after they drop out, six months from when they drop out of the case if
34 they drop out sooner. Just one question from me, Mr. Howard. The point about the use to
35 which the information is put, Mr. Lasok's submissions were based on the assumption that

1 what you were asking for really went no further than the case law of the Tribunal as to the
2 limitations placed on the OFT about changing or elaborating its case beyond that that was
3 set out in the decision. Do you accept that that is a fair summary of the point you were
4 making, or were you trying to set a narrower restriction on the points that they can build
5 into their defence based on this?
6 MR. HOWARD: No, that is why I think I said that there seems to be an element of common
7 ground. What I am concerned about is simply the Tribunal laying down clearly at this stage
8 what is the exercise upon which the OFT is embarking. Whilst one cannot necessarily
9 define things too precisely, we believe it would be useful in the Tribunal's judgment, if not
10 in a direction, to make it clear that the purpose is for what Mr. Lasok is describing as
11 "verification" and not for the purpose of embroidering or elaborating the reasons for the
12 decision and that is basically the debate. There may not be an enormous difference, but we
13 think it is important, particularly in the light of the debate we had, simply that one defines
14 things in that way.
15 THE CHAIRMAN: Yes.
16 MR. HOWARD: This is also related to the point Mr. Lasok made about whether or not his
17 experts should be entitled to see the 90 per cent of the material.
18 THE CHAIRMAN: Well it is the 10 per cent.
19 MR.HOWARD: It is limited to the 90 per cent, or also the 10 per cent. In my submission, that
20 does raise concerns as to what the experts would be doing. If they are seeking to verify,
21 they should be seeking to verify by reference to what it is we have said and to see whether
22 or not the data does support it. If they are going to seek to say: "Actually, if we look at a
23 broader base that comes to a different conclusion" in our submission that is going beyond
24 the verification exercise, and that is why we say they should be limited to looking at the
25 data which our experts have looked at. If they want to say: "You looked at 90 per cent, and
26 we do not believe looking at 90 per cent is an appropriate basis" – you have to remember
27 what it is they were asking themselves, which is what is the level of adherence? So they
28 took the main brands and in fact, when we say "90 per cent" if you look at the table it is
29 actually generally above 95 per cent, and all they are saying is that one has to necessarily do
30 a sampling exercise, "we did it by reference to the principal brands and this is what it
31 shows." We say the OFT should not be setting up an alternative exercise at this stage.
32 THE CHAIRMAN: I think we will rise now briefly to consider that. We will come back at 20
33 past three.
34 MR. THOMPSON: Would it be acceptable to the Tribunal if I leave CGL's interests in the
35 capable hands of Mr. Brown for 20 past 3?

1 THE CHAIRMAN: Yes.
2 MR. THOMPSON: I am grateful.
3 (Short Break)
4 THE CHAIRMAN: In relation to the application by the OFT for disclosure by ITL, the
5 Co-operative Group, Asda and Morrison/Safeway for disclosure by ITL of the data
6 underlying the expert reports that they have served, our conclusions on the matters of
7 principle raised are as follows: On relevance we agree that the data should be limited to that
8 up to 2007 and need not extend beyond that. However, we do not agree that it should be
9 limited to the 90 per cent sample on which the experts based their conclusions. In our
10 judgment where experts make a selection from a larger pool and draw conclusions from the
11 data relating to that selection, the process of verification should include checking whether
12 data from the sample outside the selection reveals a different picture. How far that different
13 picture, if it is revealed, undermines the conclusions of the experts is a matter for
14 submission but we need to know what the whole picture is.
15 On the question of whether we should impose a direction limiting the use to be made by the
16 OFT of the information disclosed we are concerned, as we expressed it, that making a
17 direction further than the limitation that is commonly put in an undertaking in a
18 confidentiality ring may lead to confusion and it may be difficult for the experts in the OFT
19 personnel to know how, if at all, that direction is intended to affect their analysis of the data.
20 We understand what ITL and the other appellants were getting at was that they want to
21 ensure that the OFT does not use the data to build a new and different case from the case
22 that was put against the appellants in the decision, and we certainly give the indication,
23 which those appellants seem to be seeking from us, that the Tribunal will be vigilant when
24 the defence is served to ensure that the OFT's case does not stray beyond the bounds of the
25 decision, having regard to the existing case law of the Tribunal on the limits placed on the
26 OFT's ability to change or embroider the grounds on which the findings of infringement are
27 based. So we give that indication but we do not think it is appropriate to try and formulate
28 that into a direction; it is likely to lead to more harm than good.
29 So far as identifying the persons on the OFT's side who should have access to this
30 information, clearly it is not contested that the external experts should be named, and we
31 will include those relevant experts once we are told of their identity. So far as OFT
32 employees are concerned, we are not prepared to go down the road of naming individuals
33 who have access to this information or of imposing directions as to their future employment
34 if they leave the OFT during the course of this appeal. We do not regard the possibility of
35 an OFT official who has sight of this data and then leaving the OFT to work for a

1 consultancy firm and providing services to a tobacco industry company as sufficiently likely
2 to merit placing a restriction on them. However, we expect the OFT to be alive to this
3 danger, and if this rather unlikely scenario should arise we expect the OFT to take
4 appropriate steps to ensure that the information is protected.
5 We regard the OFT's external experts as being in a different position and we are concerned
6 about their possible use of the information beyond the scope of this appeal and so we do
7 consider it is appropriate to impose an additional restriction preventing an expert from
8 providing services to a company in the tobacco industry during the course of this appeal and
9 for a six month period after it.
10 We do not agree with the OFT's approach that such a restriction should only exist if and to
11 the extent that ITL or the other appellants impose a restriction on their own experts, we
12 consider the relationships to be rather different in that regard and it is appropriate to impose
13 a restriction of the kind we have described on the OFT experts regardless of the contractual
14 or other relationship between ITL or the other retailers and their own experts.
15 Having indicated those principles, we would invite the parties to draw up an order reflecting
16 them, that order may most easily be made separate from the existing confidentiality ring
17 rather than trying to insert provisions into that confidentiality ring order so that it is a free
18 standing order.
19 Assuming that that then concludes the matters that we will deal with at this CMC we
20 therefore have one order which the Tribunal will draw up which sets out the timetable that
21 we indicated earlier, deals with the point about the Sainsbury's intervention that we dealt
22 with first thing this morning, and also incorporates the wording that the OFT agreed to give
23 us as regards writing to third parties about the disclosure of their confidential information.
24 Then there will be the separate order dealing with the disclosure by ITL and others of their
25 pricing data, as we have just discussed, and finally any order relating to the disclosure of
26 information about Tesco, as we discussed also this morning, will be dealt with at the same
27 time as we give our ruling on that application.
28 Does that then conclude matters for today?
29 MR. FLYNN: Madam, speaking for myself, I wonder if the order will embody anything on
30 timing as far as the matters which the OFT is to seek the views of the third parties? I think
31 that is not an issue that has been ventilated, but obviously it is something that needs to be
32 set down. I do not know what the OFT is able to offer on that and we would obviously
33 rather see it as soon as that process could be completed.
34 MR. LASOK: I had indicated that one could choose, for example, between seven and 14 days. It
35 is really a matter for the Tribunal. We would be content with a seven day period.

1 THE CHAIRMAN: Well, why do you not draw up the order on that basis and circulate it to the
2 parties at the same time as you circulate it to us and then if anyone has any comments on
3 that they can let us know.
4 MR. LASOK: I think there is the timing for the disclosure by the appellants of the data that we
5 were discussing, maybe that needs to be incorporated in the order as well?
6 THE CHAIRMAN: Yes, it should be, and perhaps you could liaise to see if you can agree a
7 timing rather than us setting a time.
8 MR. LASOK: I think the very real difficulty is that we need that data as soon as possible, because
9 the longer there is a delay then the more difficult it is for us to assimilate the information
10 and produce a proper experts' report on it, but I take it at the moment the Tribunal would
11 prefer the matter to be discussed with the parties. If there is disagreement it may be
12 necessary to come back to the Tribunal.
13 THE CHAIRMAN: Yes, clearly it is important for you to see that information in time for you to
14 prepare your defence evidence, but I think it would be best if you discussed it with the
15 parties and tried to reach agreement on that. We will make the order adding your experts to
16 the confidentiality ring but I understand no parties have objected to the addition of those
17 people, so we will make that in the usual ----
18 MR. LASOK: But it does underline the importance of getting the order sorted out sooner rather
19 than later, because until the confidentiality ring order has been amended to include these
20 people they are outside the magic circle.
21 THE CHAIRMAN: Yes, well we usually manage to do these sorts of things fairly speedily and
22 will do our best in relation to that. Very well, we will see you all again, if not before, on
23 31st March next year.
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